

MERRITT KING



KFN 10 A23

5229

29

460

G93

DECISIONS

OF THE

New York Court of Appeals.

EDITED BY AUSTIN ABBOTT:

WITH THE SANCTION OF THE COURT.

This authoritative collection in five volumes, consists of full reports of all such cases not contained in the series known as the New York Reports, as on careful examination have been found worthy of permanent preservation.

A large proportion of these cases are of leading importance; and much embarrassment has resulted from the uncertainty as to what was actually decided in these cases.

NOTES Inform the reader of **EVERY INSTANCE IN WHICH THE CASE IN THE TEXT HAS BEEN CITED** by the Court; also of **OTHER IMPORTANT CASES** on the same subject.

EVERY CASE THAT AFFIRMS OR REVERSES a decision, has at the head a reference to the report of the case below. Price \$6 per vol. Containing more matter than three ordinary vols. These vols., besides the unreported cases, contain the matter of Keyes' Reports and the Transcript Appeals.

From the Albany Law Journal, Sept. 20, 1873.

Mr. Abbott, in the present series, has performed his work so well that we think most of those who can afford to do so will be called upon to purchase it. It contains cases never elsewhere reported, corrects many misreported cases calculated to mislead, and his notes of more recent cases and of cases not referred to in the opinions, add very much to the value of his volumes. Lawyers who have not purchased Keyes' reports will not understandingly do so, but will take Mr. Abbott's instead of them. It is true Keyes' are sold at a smaller price, but, in comparison with Mr. Abbott's, they are not only utterly valueless, but are calculated to and will constantly mislead. A poor book is expensive at any price, while a good one, at reasonable figures, will win its way to popular favor. While opposed to the great accumulation of reports there are circumstances which justify them.

We can hardly imagine a stronger combination of such circumstances than the miserable and disreputable manner in which Keyes' reports were foisted upon the profession and the courts. They are the decisions of the highest court of our State, and if Mr. Abbott or his publishers can succeed in replacing them with his, it will be a merited rebuke to the publisher of Keyes, and will certainly do much to rescue our court of highest resort from the odium cast upon it by the contemptible manner in which its decisions were at one time given to the world.

DIOSSY & COMPANY, Publishers,

86 Nassau Street, N. Y



Cornell University Library

KFN5229.Z9G93

Mechanics' lien laws for New York City :

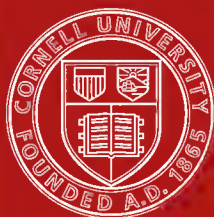


3 1924 022 801 231

law

I have examined Mr
Guemsey's Mechanics' Lien Laws
and found the subject well ar-
ranged, the decisions carefully
stated, and regard the work as
indispensable to any one having
occasion to practice under the
Lien Laws.

Chas. F. Daly
Chief Justice of the
New York Common Pleas

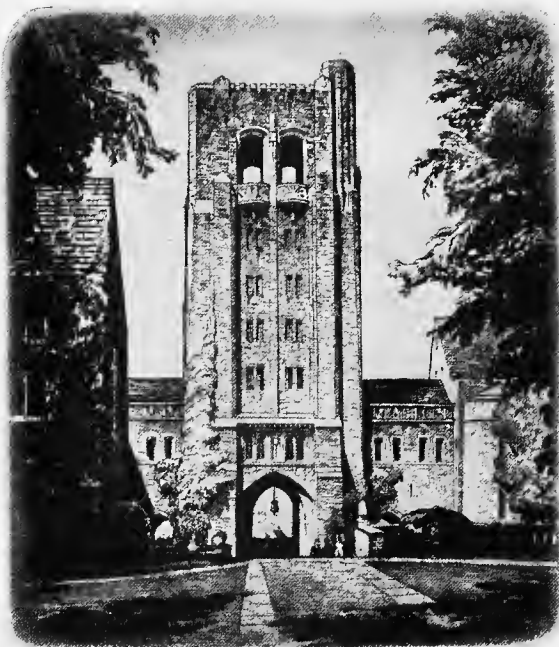


Cornell University
Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

<http://www.archive.org/details/cu31924022801231>



Cornell Law School Library

MECHANICS' LIEN LAWS

FOR

NEW YORK CITY,

AND FOR THE

COUNTIES OF KINGS AND QUEENS.

STATUTES, DIGEST AND COMMENTARIES,

WITH

NUMEROUS FORMS.

BY R. S. GUERNSEY,
Counsellor-at-Law.



NEW YORK :

1873.

~~A 19.203~~

~~10 A23~~

B.41393

Entered according to Act of Congress, in the year 1873,
By R. S. GUERNEY,
In the Office of the Librarian of Congress at Washington.

PREFACE.

The first statute upon the subject of liens for performing work or furnishing materials used in the erection or altering or repairing of buildings in the State of New York, was passed in 1830 (*chap.* 330), and applied exclusively to the city and county of New York. That act was amended in 1832 (*chap.* 120). Another law was passed in 1844 (*chap.* 220) relating to New York city only. All these laws were repealed in 1851 and another law substituted in their place (*Laws* 1851, *chap.* 513). This was amended in 1855 (*chap.* 404). These laws continued in force until the Act of May 5th, 1863 (*chap.* 500), which latter act and amendments thereto in 1866 (*chap.* 529) and the Acts of 1870 (*chap.* 529) and 1872 (*chap.* 669) now constitute the only direct statutory law on the subject relating to the city of New York.

The Statute of 1863 *in terms* (§ 12) repeals the former laws on the subject, yet it is apparent that this act is mainly based upon the Laws of 1851 and 1855, and the practice and decisions that had grown up under them ; consequently they must be referred to in order to properly interpret and understand the present law, and therefore the Statute of 1851, and every

one since that relating to New York city, and also the statutes relating to the counties of Kings and Queens, are inserted in full in order to make this book a practical compendium of the law and decisions upon the subject to which it is devoted.*

Although the "Mechanics' Lien Law," as it was at first and continues to be designated, was created by special statute and is still professed to be governed by special statute, it may now be said of it, as the late Mr. Justice Best said of the laws of England, that most of the law is derived from judicial decisions. In every reported decision in this State on the subject something will be found that may be useful in the administration of the present law. The table of cases cited at page 211, *post*, contains nearly two hundred cases, being *all ever reported* on the subject in this State. The portion of them digested is mainly that which may be of value at the present time, and relating to the general principles of these laws.

The author has discussed or stated *every question*, or the principles of it, that has occurred to him, that has arisen or can arise, which is exclusively confined to the nature of these statutes.

Viewing this law as a whole, it will be seen that it is now a *system founded upon principles that are substantial, and therefore, lasting, and must continue to be the SAME IN SUBSTANCE so long as any liens of that nature are allowed by any statute in any locality, in any State or country where justice to the respective parties is recognized and administered according to the established rules of law and equity.*†

* For a full list of the various laws that have been enacted, relating to Mechanics' Liens in this State, see *Gerard's Titles to Real Estate*, 2d edition, p. 751.

† For the effect of a change of the laws of this nature that have heretofore existed and that may hereafter be made, see each act for itself, and *Sullivan vs. Brewster*, 1 E. D. S., 681; *Brien vs. Clay*, 1 E. D. S., 649; *Donaldson vs. O'Connor*, 1 E. D. S., 595; *Miller vs. Moore*, 1 E. D. S., 739; *Hauptman vs. Catlin*, 3 E. D. S., 666, *affirmed* 20 N. Y., 247; *Hallaghan vs. Herbert*, 11 Abb., N. S., 326; *Moore vs. Mausert*, 5 Lansing, 173; *Trim vs. Willoughby*, 44 How., 189.

The subjects discussed in the following work will make it a useful reference in procedure in *all equitable actions*, and in the enforcement of *any and all legal or equitable liens upon specific property*, whether by judgment, or mortgage, or created by statute, or arising by any contract.

R. S. G.

NEW YORK, Sept. 15th, 1873.

ERRATA.

No. 35, *Walker vs. Paine*, *E. D. S.*, 624, read 2 *E. D. S.*, 662 ;
and *Grogan vs. McMahon*, 2 *E. D. S.*, 754, read 4 *E. D.*
S., 754.

No. 54, *Mushlitt vs. Silverman*, read *Schajer vs. Reilly*, 50 *N. Y.*,
61.

No. 106, first line, executor's contract, read executory contract.

No. 161, first line, filed at, read filed and.

No. 485, first line, p. 1, read p. 15.

No. 540, referee issuing, read referee usury.

No. 625, last line, *ante*, 621, read *ante*, 622.

No. 660, last line, *post*, 651, read *ante*, 656.

TABLE OF CONTENTS.

Part I.

INTRODUCTION AND STATUTES RELATING TO NEW YORK CITY.

	PAGE.
<i>Introduction</i>	1-4
<i>Statutes of</i> 1863.....	4-10
“ “ 1866.....	5
“ “ 1870.....	10
“ “ 1872.....	11
“ “ 1851.....	11-15
“ “ 1855.....	15-17

Part II.

OF ACQUIRING AND PERFECTING A LIEN.

	NO.
<i>Chapter 1. Who may acquire a Lien</i>	1-20
“ 2. <i>For what a Lien may be acquired</i>	21-37
“ 3. <i>Time of Filing Notice</i>	38-57
“ 4. <i>Lien, on What and Extent</i>	58-139
“ 5. <i>The Notice of Lien</i>	140-186
“ 6. <i>Continuance and Discharge of Lien</i>	187-221

Part III.

OF FORECLOSURE OF LIENS.

<i>Chapter 1. Jurisdiction of Courts</i>	222-234
“ 2. <i>Time and Manner of Enforcing Liens</i> ...	235-263

Chapter 3.	<i>Parties to the Proceedings</i>	264-404
“ 4.	<i>Pleadings and Claims</i>	405-510
“ 5.	<i>Modes of Trial</i>	511-549
“ 6.	<i>The Evidence</i>	550-661
“ 7.	<i>The Judgment</i>	662-784
“ 8.	<i>Costs</i>	785-827
“ 9.	<i>Execution</i>	828-874
“ 10.	<i>Appeals</i>	875-899

Part IV.

STATUTES RELATING TO THE COUNTIES OF KINGS AND QUEENS.

<i>Observations on the Laws relating to the Counties of Kings and Queens</i>	900-963
--	---------

Part V.

<i>Forms</i>	181
<i>Table of Lien Cases cited in this Volume</i>	211
<i>Index</i>	218

PART I.

INTRODUCTION AND STATUTES RELATING TO NEW YORK CITY.

INTRODUCTION.

The doctrine of liens rests upon the broad foundation of natural equity and commercial necessity. Nothing is more reasonable than that an artificer or business man should have a qualified property in the thing upon which he has bestowed time and labor, or with which he has incorporated his materials.

A lien at common law is not, in strictness, either a *jus in re* or a *jus ad rem*, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged. It generally exists in favor of artisans and others who have bestowed labor and services upon the property in its repair, improvement and preservation. (*Story's Equity*, § 506.) A lien is either general or specific; the latter is specially favored in law, (2 *Kent*, 633,) as all tradesmen are allowed a particular lien. (1 *Atk.*, 228.)

Liens on ships and vessels are allowed by the general maritime law for seamen's wages, repairs, supplies, &c., in certain cases, (3 *Kent*, 169,) and this right has been much extended and regulated by State and national legislation.

Possession of personal property, excepting ships and vessels, is necessary to create a lien, and it exists during such time only

as the party has possession, either by himself or his agent. (*McFarland vs. Wheeler*, 26 *Wend.*, 467; *Sweet vs. Pym*, 1 *East*, 4; *Story's Equity Jurisp.*, § 1216.) If the owner of the lien parts with the possession after the lien has attached, as a general rule the lien is lost. (*Id.*) The reason of this is, that so long as a party has possession it is constructive notice that a lien may exist, and purchasers are put upon their inquiry as to the extent of such lien.

Under the common law, a person does not acquire a lien for his services on the money due his employer, the contractor. (*Hoyt vs. Story*, 3 *Barb.*, 262.)

From the common law lien on personal property is derived the principle of the mechanic's lien by special statutes which now exist in nearly all the States, by virtue of which mechanics, material men or persons furnishing labor or materials for the erection, alteration or repairing of buildings, are entitled to perfect a lien therefor on such buildings and the land to a certain extent, which is a preference over other creditors in the payment of debts. This right, given and prescribed by special statute, is of a remedial character, merely providing a new remedy without increasing the liability of the owner.

Liens on lands in similar cases were given by the Roman Law, Domat's Civil Law, §§ 1742, 1744, and by the Code Napoleon, p. 571. Great Britain has not yet any similar law relating to the subject.

The policy of the system in its early stages among us has often seriously been questioned, and doubts have frequently been expressed as to whether, upon the whole, it works well even for those for whose benefit it was enacted. This is owing entirely to the imperfections of the statutes, or their construction by the courts under which the system was attempted to be carried out.

The general recognition by American legislation of the enactment of laws of this nature, as well as special statutes for the purpose of meeting the necessity of some particular locality, are the best proofs of the justice, propriety and utility of the principle. *

* See Houck's Law of Liens in the United States.

The principal utility and justice of these liens have more recently been made to protect all persons engaged by the contractor, directly or indirectly, by the equitable subrogation or diversion of money due him from the owner for the security of the payment of those to whom the contractor is indebted. This has been, and still is, the principal object of all the various lien laws relating to the city of New York, and in this is their most frequent and beneficial office.

The object and effect of these statutes is simply to take from the owner money actually owing by him upon his contract and apply it in payment for the labor and materials which sub-contractors or material men or others have contributed towards the completion and performance of the same contract. (*Sullivan vs. Decker*, 1 E. D. S., 699; *Doughty vs. Devlin*, 1 E. D. S., 625; *Ferguson vs. Burke*, 4 E. D. S., 760; *Donaldson vs. Wood*, 22 Wend., 395; *Loonie vs. Hogan*, 9 N. Y., 435.) This is enforced by allowing a lien on the property to the extent of the amount due from the owner to the contractor on the contract.

As to the mode of perfecting such a lien under the statute, Chief Justice Daly says :

"The whole design of this statute is to render the proceeding "on the part of the mechanic or material man, in imposing and "enforcing his lien, as simple as possible, and connected with "as little detail as may be consistent with the due protection "of the rights of the owner, or of other parties whose interests "may be affected by the incumbrance created." (*Paine vs. Bonney*, 4 E. D. S., 734.)

The lien, when perfected, is only to the extent of the contracting owner's interest in the property at the time the notice required by the statute is filed (§ 1, amd. 1866); therefore, if the owner has *bona fide* parted with his interest in the property before the filing, no lien is acquired. Again, the contracting owner or his property is only liable to the amount due from him to his contractor, and if he has paid up according to his contract no lien can be acquired, because he cannot be required to pay a greater amount than the contract price (*unless there is fraud*) or value of the work and materials furnished upon his land by his contractor (§§ 1 and 3).*

* The same principle prevails in regard to a common law lien on personal property, to wit, that if the party who holds the property by virtue of a lien

Of the manner of enforcing a lien, Chief Justice Daly says :
 “ The foreclosure of a lien, whether it arises under the
 “ Mechanics’ Lien Law or otherwise, is a matter of equitable
 “ jurisdiction. It is an equitable, as contra-distinguished from
 “ a legal remedy ; and the course of procedure, whether it re-
 “ lates to the pleadings, the mode of trial, the evidence, or the
 “ remedy, is in accordance with the courts of equity, except
 “ so far as it has been modified in this State by statute.”
 (*Hubbell vs. Schreyer*, 14 *Abb. N. S.*, 284.)

These special statutes and the principles involved in their construction, as to who may acquire a builder’s lien, the manner of perfecting it, and the mode of enforcing it, is the object of this work.*

STATUTES RELATING TO NEW YORK CITY.

Laws 1863, Chapter 500.

AN ACT to secure the Payment of Mechanics, Laborers and Persons furnishing Materials towards the Erection, Altering or Repairing of Buildings in the City of New York.

Passed May 5, 1863.

SECTION 1. Any person or persons who shall hereafter, as contractor, laborer, workman, merchant or trader, in pursuance of, or in conformity with, the terms of any contract with or employment by the owner, or by or in accordance with the directions of the owner or his agent, perform any labor or furnish any materials towards the erection of, or in altering, improving or repairing of any building or buildings, or the

pledges it for a larger amount than is due him from the owner, the pledge is only valid against the owner to the amount actually due from him to the pledgor. (*Daubigny vs. Duval*, 5 *Term R.*, 604.)

* The common law right of lien on personal property and the proper mode of enforcing the same, see *Trust v. Pierson*, 1 *Hilton*, 292.

appurtenances thereto,* in the city of New York, on complying with the sixth section of this act, shall have a lien for the value of such labor or materials, or either, upon such house or building and the appurtenances and lot on which the same shall stand, to the full value of such claim or demand, and these liens may be filed and become an absolute lien to the full and fair value of all such work and materials and to the extent of the right, title and interest then existing of the owner of said premises, in favor of every person or persons who shall be employed by any owner, contractor, sub-contractor, jobber or master workman in manner aforesaid (*and notwithstanding any sale, transfer or incumbrance made or incurred at any time after the commencement of the work or furnishing of materials*†) provided that all mortgages given in good faith for full value, which shall have been executed and recorded at any time prior to any actual work done or materials furnished, shall not be affected or impaired by such lien, and provided, also, that no owner shall be required to pay a greater amount than the contract price or value of the work and materials furnished, *when no specific contract is made, upon his land by his contractor.*

* See Amendment, Laws 1870, ch. 529, and 1872, ch. 669, post p. 11.

† The portion in parenthesis has been repealed as follows :

LAWS 1866, CH. 752.

AN ACT to amend "An Act to secure the payment of Mechanics, Laborers and Persons furnishing Materials towards the Erection, Altering or Repairing of Buildings in the City of New York," passed May fifth, eighteen hundred and sixty-three.

Passed April 21st, 1866.

SECTION 1. All persons who shall be or become entitled to have a lien in pursuance of the act entitled "An Act to secure the Payment of Mechanics, Laborers, and Persons furnishing Materials towards the Erection, Altering or Repairing of Buildings in the City of New York," passed May fifth, eighteen hundred and sixty-three, and who shall file a notice thereof under and according to said act, shall have a lien for the full and fair value of their labor and materials, or either, upon such house or building and the appurtenances and lot on which the same shall stand, to the extent of all the right, title and interest which the owner shall have therein at the time of filing the notice of lien required by the sixth section of said act, and to no greater extent.

§ 2. This act shall take effect immediately.

§ 2. All persons having liens, in order to enforce the same, shall prove their demands in the same manner as in ordinary actions at law, except that no variance as to the persons named as contractor, owner or debtor in the lien, notice or bill of particulars or statement of claim or in any pleading, shall impair or affect the rights of the claimants as hereinafter defined, and every party shall have relief according to the rights of the parties as they shall appear in evidence.

§ 3. In case of successive liens by the contractor, sub-contractor, workman, person or persons furnishing materials, and of a number of liens in favor of different persons, their rights and priorities shall be determined as follows: The lien of the laborer, cartman, material man and sub-contractor shall be entitled to a priority over the contractor for the payments due for his services or materials. In case of several buildings done under one contract, in conflicting liens, each shall have priority on the particular building where his labor is performed or his material used. Persons standing in equal degree as co-laborers, or various persons furnishing materials, shall have priority according to the date of filing their liens. Where several lien notices are filed for the same demand, as in case of a contractor, including claims for workmen to whom he is indebted, and a lien by the workmen, the judgment shall provide for the proper payments, so that under the liens filed double payment shall not be required, but no payments voluntarily made shall impair the lien of any person, except the one to the person so paid.

§ 4. Any person or persons having filed a notice of lien may, in ten days thereafter, institute a proceeding to enforce or foreclose the lien, and any owner or other person interested may also commence such proceedings, and in such proceedings, each and every person or persons who have filed liens shall be parties to, and have notice of the said proceedings, and said person or persons filing liens before final judgment, shall be notified to appear and join in the said proceedings, by a notice to be served upon said person or persons at least five days before the entering of said judgment. Where the aggregate of liens shall be less than five hundred dollars, the said proceedings may be had before any court in the said

city, and where they exceed that sum, when the proceedings are commenced, the action shall be conducted in a court of record having equity jurisdiction, and none of the courts in the said city shall be deprived of jurisdiction by reason of the residence of parties elsewhere, and service of process in such action may be by publication as to any of the parties not residing in this State, or who may have removed therefrom.

§ 5. The proceedings shall be commenced by a notice stating the liens and times of filing, and be served upon all persons having filed notices of lien at the place by them designated, and on the owner and incumbrancers when they can be found, requiring them to appear in court at a day and hour named, and be served ten days before the time specified, except those acquiring after-liens, who shall be required to appear summarily at such time as the court or judge thereof shall order, and within ten days after service each party shall file in court or with the clerk, a brief statement of his claim, and any party interested may, in five days, state his objections to such claim, and, if in a court of record, copies of these shall be served on the attorney of any claimant whose claim is to be affected by such objection, and the issue thus made shall be tried as in ordinary actions. The court shall proceed without regard to matters of form, which shall be amendable at all times while the proceedings progress, without costs, and judgment shall be rendered according to the equity and justice of the claims of the respective parties.

§ 6. At any time before the whole work is completed, and within three months* after the work is done or the materials furnished, for which a lien is sought, if the work is then finished or abandoned, any claimant may file with the county clerk, a notice, stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, from whom, and to whom due, or if not yet due, when it will become due, with a brief description of the premises, by street number or diagram or boundary, or by a reference to maps open to the public, so as to furnish information to persons examining titles, and the supposed owner, although no error in the owner's name shall impair the validity of the lien. The clerk shall enter in

* See Amendment, Laws, 1872, ch. 669, post p. 11.

the lien docket the name and residence of the claimant, the person against whom claimed, the amount and the date of filing, the street and particular place where located, in such manner as to be convenient in searching for the liens by street and block, and he shall receive ten cents on filing the same. He shall also enter on this docket a notice that a suit is commenced thereon, upon a notice of that fact and affidavit of service being filed with him, for which he shall receive five cents. The county clerk shall make searches for such liens upon being furnished with a proper description of any property and without reference to the individuals against whom the lien is filed, his fees to be five cents per year for the time embraced in said search; (and the said county clerk shall have the power to appoint a clerk to aid and assist him in the performance of the duties appertaining to this act, to be designated as the Mechanics' Lien Clerk, at a salary of the sum of two thousand dollars per annum, to be provided for by the board of supervisors of the said county.)—[*As Amended Laws, 1868, ch. 79, by adding the portion in parenthesis*].

§ 7. In case the parties notified shall neglect to appear and object or insist on any claim, the court may take the proofs and determine the equities of the parties, and in such case, or in cases where they appear and plead, the court may determine the rights of all parties, and the amounts due to each, and by whom to be paid, and may order any question tried by a jury, or refer the whole matter to a referee, to examine and pass upon the rights of the respective parties, and report upon the same in a summary manner, as in case of claims to surplus moneys in mortgage cases, on which every party shall be at liberty to take proofs for or against any claim or lien, and such judgment or decree shall be made thereon as to the rights and equities of the several parties, among themselves and as against any owner, as may be just. Any party aggrieved by any decision may, within ten days after notice of the judgment or decree, appeal from such judgment or any part thereof, if the judgment is in a district court or in the Marine Court, to the general term of the Court of Common Pleas, and if in any other court, to the general term of such court; such appeals to be heard and decided, as in case of appeals from an order at special term.

§ 8. Such appeal shall only stay so much of the proceedings as a judge of either the court below or a judge of the appellate court shall order to be so stayed, until the hearing of such appeal, and on such terms, as to security or otherwise, as such court or judge may order. On any party being liable for or claiming an amount exceeding five hundred dollars to be affected thereby, such party may appeal to the Court of Appeals, but such appeal shall in no case stay proceedings, without such security as is now required to such court, nor unless the court in which judgment is rendered shall so order.

§ 9. Judgments may be enforced by an execution, on which the property on which the lien is adjudged may be sold, and the proceeds distributed as ordered by such judgment, and personal liabilities may be enforced by execution against the property of any party against whom a personal judgment shall have been rendered. The contractor shall be personally liable to the lienor for the whole amount of his indebtedness, and the owner to the extent of the amount due by him to his contractor.

§ 10. The lien so filed may be discharged :

(1.) By filing a certificate of the claimant, or his successor in interest, acknowledged or proved as the satisfaction of mortgage is required to be, stating the lien is discharged.

(2.) By depositing the amount of any lien and interest to the credit of the lien with the clerk where the lien is filed, provided no action shall have been commenced for the enforcement of said lien, and in case an action shall have been commenced, then such additional amount as security for the costs thereof as a judge of the court where such action shall have been commenced shall deem proper, which sum shall be held subject to such lien in place of the land and building.

(3.) By an entry of an order to discharge the same by any judge of a court of record made on due proof that one year has elapsed, and that no action or proceeding has been had on such lien, and a certificate of the clerk that no notice of such proceeding has been filed with him.

(4.) By a judgment or docket of a judgment exempting such property after ten days, on proof of notice of such judgment

and that ten days have elapsed and no appeal has been taken therefrom.

(5.) By an entry by order of the court that the judgment has been secured on appeal.

(6.) By satisfaction of any judgment on such lien.

§ 11. Liens shall in all cases cease after one year, unless by order of court the lien is continued and a new docket made stating such fact (without a discharge of the lien).

§ 12. All former acts giving liens in the city of New York to mechanics and others erecting buildings in the city of New York are repealed, except so far as may be necessary to carry into effect liens acquired before this act takes effect, and any person or persons performing work or furnishing materials under any contract made prior to July first, eighteen hundred and sixty-three, may thereafter acquire a lien therefor pursuant to the provisions of this act.

§ 13. No transfer or assignment of his interest in the contract by the contractors shall be valid as against parties entitled to file liens under said contract against said contractor.

§ 14. For the purposes of this act, any person or persons who may have sold or disposed of his or their lands upon an executory contract of purchase contingent upon the erection of buildings thereon, shall be deemed the owner and his vendee the contractor, and said owner shall in all respects be subject to the provisions of this act.

§ 15. This act shall take effect on the first day of July, eighteen hundred and sixty-three.

Laws 1870, Chapter 529.

AN ACT in relation to Mechanics' Liens.

Passed May 2, 1872.

SECTION 1. The provisions of the laws relating to mechanics' liens heretofore passed, shall apply to bridges and trestle work erected for railroads, and materials furnished therefor, and labor performed in constructing said trestle work and other structures connected therewith, and the time within which said

liens may be filed shall be extended to ninety days from the time when the last work shall have been performed on said bridges, trestle work and structures connected therewith, or the time from which said materials shall have been delivered. This act shall apply to all uncompleted work commenced previous to the passage of this act.

§ 2. This act shall take effect immediately.

Laws 1872, Chapter 660.

AN ACT in relation to Mechanics' Liens.

Passed May 13, 1872.

SECTION 1. All the provisions of the laws relating to mechanics' liens heretofore passed shall apply to wharves, piers, bulkheads and bridges, and materials furnished therefor, and labor performed in constructing said wharves, piers, bulkheads and bridges, and other structures connected therewith, and the time within which said liens may be filed shall be thirty days from the time when the last work shall have been performed on said wharves, piers, bulkheads and bridges, and structures connected therewith, or the time from which said material shall have been delivered. This act shall apply to all incomplete work commenced previous to the passage of this act.

§ 2. This act shall take effect immediately.

Laws of 1851, Chapter 513.*

AN ACT for the better security of Mechanics and others Erecting Buildings, and furnishing materials therefor, in the City and County of New York.

Passed July 11, 1851.

§ 1. Any person who shall hereafter, by virtue of any contract with the owner thereof, or his agent, or any person who, in pursuance of an agreement with any such contractor, shall,

* Repealed by Laws of 1863, Ch. 500, § 12 *ante* p. 10.

in conformity with the terms of such contract, perform any labor or furnish materials in building, altering or repairing any house or other building, or appurtenances to any house or other building in the city and county of New York, shall, upon filing the notice prescribed in the sixth section thereof, have a lien for the value of such labor and materials upon such house or building and appurtenances, and upon the lot of land, upon which the same stand, to the extent of the right, title and interest at that time existing, of such owner, in the manner and to the extent hereinafter provided; but such owner shall not be obliged to pay for or on account of such house, other building or appurtenances, in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract.

§ 2. Any person furnishing such materials or performing such labor, in pursuance of a written contract with such owner or his agent, shall produce such contract, or the best evidence thereof in his possession, the validity of which shall be established in evidence before the court in which he may bring his suit to recover the value of his lien, and shall recover no more than the price stipulated to be paid to him in such contract.

§ 3. Any person performing such labor or furnishing such materials, without a written contract with such owner or his agent, shall produce evidence as mentioned in the preceding section, to establish the value of such labor or materials, and that the same were used by the said owner or his agent, or the original contractor, in the erection, alteration or repairing of such building.

§ 4. Any contractor or laborer, or any person furnishing materials in pursuance of any contract made by such contractor with such owner or his said agent therefor, may, after such labor has been performed, or materials furnished, enforce or bring to a close such lien, by serving or causing a notice to be served personally on such owner or his agent, contractor or laborer, or person furnishing materials, requiring him to appear in the Court of Common Pleas, or, provided the amount claimed do not exceed one hundred dollars, in a justice's court

of the judicial district in which such building is situated, or in the Marine Court of said city and county of New York, either in person or by attorney, at a time certain, upon some day to be specified in such notice, not less than twenty days from the service thereof, and submit to an accounting and settlement in such court, of the amount due or claimed to be due for the labor thus performed, or the materials thus furnished.

§ 5. At the time, or within fifteen days after the service of such notice, a bill of particulars of the amount claimed to be due shall be served personally on such owner, or his legal representatives, and also a bill of particulars of any off-set which may be claimed to the same shall be served in like manner upon the laborer, contractor or person furnishing materials, as the case may be.

§ 6. Within six months after the performance of such labor or the furnishing of such materials, the contractor, sub-contractor, laborer or person furnishing materials shall serve a notice in writing upon the county clerk, specifying the amount of the claim, and the person against whom the claim is made, the name of the owner of the building, and the situation of the building, by its street and number, if the number be known. The county clerk shall enter the particulars of such notice in a book to be kept in his office to be called "The Lien Docket," which shall be suitably ruled in columns headed "claimants," "against whom claimed," "owners," "builders," "amount claimed," and "date of notice, hour, minute," "what proceedings have been had." The names of owners and persons against whom the claim is made to be inserted in alphabetical order. A fee of ten cents shall be paid to the county clerk on filing such lien, of which fees an account shall be rendered to the board of supervisors, as provided by law with regard to other fees.

§ 7. In case said owner shall not appear at the time and place specified in the notice given, in pursuance of the requirements of sections four and five, then, on filing with the county clerk, or with the clerk of the Marine Court, or with the justice, an affidavit of the service of such notice, and of the default of the owner to appear, a writ of inquiry may be issued to the sheriff of said city and county to assess the amount of

such claim, or the amount of such claim may be assessed by the Court of Common Pleas, Justice's Court or the Marine Court, as the case may be, and upon the return of the writ of inquiry, or the assessment by the court, judgment shall be entered upon the same, and execution shall issue for the enforcement of said claim so adjudicated and established, in the same manner as in cases upon other judgments in such courts.

§ 8. On the appearance of both parties in pursuance of the above requirement, issue shall be joined upon the claims made, and notice of set-off served, and the same may be noticed for trial and put upon the calendar of said court by either party, and shall be governed, tried, and the judgment thereon enforced, in all respects in the same manner as upon issues joined and judgments rendered in all other civil actions for the recovery of moneys in said court.

§ 9. A transcript of every judgment rendered, headed "lien docket," shall be furnished by the clerk of the court or the justice, to the successful party, who may file the same with the county clerk, whose duty it shall be to enter the name of the court and the amount of the judgment, or where judgment is against the claimant, the word "discharged" under the last head in his docket.

§ 10. Costs shall be allowed upon the same principles and by the same rules, in such proceeding, as they are now allowed by statute in civil actions for the recovery of money, and shall form a part of the judgment recovered in the same.

§ 11. The lien may be discharged as follows :

1. By filing a certificate of the claimant or his successors in interest, acknowledged or proved in the same manner as the satisfaction of a mortgage, stating that the lien is discharged : or,

2. By the deposit with the clerk of a sum of money equal to the amount claimed, which money shall thereupon be held subject to the lien : or,

3. By an entry of the clerk made in the book of liens, after one year has elapsed since the filing of the claim, stating

that no notice has been given to him of legal steps to enforce the lien : or,

4. By an affidavit of service of a notice from the owner to the claimant, requiring him to commence an action for the enforcement of his lien, on or before a certain hour or day specified in said notice, and the lapse of thirty days thereafter, without any affidavit from the claimant being filed of the service of the notice required in section four.

5. By satisfaction of the lien, upon an action for the enforcement thereof.

§ 12. Every lien created under the first section of this act, shall continue until the expiration of one year from the creation thereof, and until judgment rendered in any proceedings for the enforcement thereof.

§ 13. The act entitled "An Act for the better security of mechanics and others erecting buildings in the city and county of New York," passed April 20, 1830; and the act entitled, "An Act for the better security of mechanics and others erecting buildings and furnishing materials therefor, in the city and county of New York," passed April 29, 1844, are hereby repealed.

Laws of 1855, Chapter 404.*

AN ACT to amend an act entitled "An Act for the better security of mechanics and others erecting buildings and furnishing materials therefor, in the city and county of New York," passed July eleventh, one thousand eight hundred and fifty-one.

Passed April 13, 1855.

§ 1. Whenever judgment shall be rendered in favor of the claimant in any proceeding commenced under the act hereby amended, such judgment shall direct the sale of the interest of the owner in the land and premises upon which the lien exists, to the extent of the right of such owner at the time of the filing of the notice of lien, in pursuance of said act, and that the proceeds of such sale shall be applied to the payment of the

* Repealed by Laws of 1863, Ch. 500, § 12, *ante* p. 10.

costs of the proceeding, and of the amount found to be due to such claimant, and that the residue of such proceeds be paid to the clerk of the city and county of New York, to abide the further order of the court.

§ 2. The owner may apply to the Court of Common Pleas for the city and county of New York, for an order directing the clerk to pay to him the proceeds of such sale so paid to the said clerk, upon producing the certificate of the clerk of the city and county of New York, that there are no liens docketed in his office against or affecting the said premises, which have been filed under this act.

§ 3. If it shall appear that there are other liens on file with the clerk of the city and county of New York affecting the said premises, notice of such application shall be given to the claimants respectively filing the notices creating such liens, and thereupon the said court shall distribute such proceeds among the parties entitled thereto, according to their respective rights and priorities, and may order a reference to take proofs in relation to such rights and priorities.

§ 4. In all sales under judgments to be rendered in these proceedings, the interest of the owner shall be sold subject to any prior liens existing thereon, unless the claimants under such liens shall be made parties to the proceedings, in which case the court shall settle the rights of the claimants, and the payment by the owner of any valid lien or of any judgment recovered in pursuance of the said act shall enure to him as a payment to the amount thereof to the contractor.

§ 5. When the proceedings are commenced by a person having a claim against a contractor with the owner; such contractor may be made a defendant with such owner, and judgment may be rendered against the contractor for the amount which shall be found owing by him in addition to the judgment hereinbefore provided for against such owner, and the court may award costs against such of the parties as shall be just.

§ 6. Whenever the owner or other person who shall be notified by the claimant to appear in the Court of Common Pleas, and submit to an accounting in pursuance of the provisions of

the act hereby amended, shall not appear, the court shall order a writ of inquiry to issue, or appoint a referee to have the damages assessed therein, and the subsequent proceedings thereon shall be conducted as in other actions pending in the said court. In the Marine and District Courts the amount shall be ascertained by the court.

§ 7. The notice to create a lien shall be verified before filing in the same manner as a pleading is now required to be verified by the Code of Procedure.

PART II.

ACQUIRING AND PERFECTING A LIEN.

CHAPTER I.

WHO MAY ACQUIRE A LIEN.

1. A lien may be obtained "in favor of *every person or persons* who shall be employed by any owner, contractor, sub-contractor, "jobber or master workman," * * "to perform any labor or furnish any materials towards the erection of, or in altering, improving or repairing of, any building or buildings, or the appurtenances thereto." (§ 1.)

2. Such labor or materials must be furnished in compliance with "the terms of any contract with or employment by the owner, or by or in accordance with the directions of the owner or his agent." (§ 1.)

3. The contract may be implied as well as an express contract. (*Hauptman vs. Catlin*, 20 N. Y., 247; *Spencer vs. Barnett*, 35 N. Y., 94; *Knapp vs. Brown*, 45 N. Y., 207.)

4. It may be stated, as a *general rule*, that where a judgment can be procured by a party in an ordinary action for the work or materials furnished by such party, he is entitled to perfect a lien under this act.

5. A *married woman* may acquire a valid lien by filing the notice in her own name, when the matter relates to her separate property.

6. A lien may be acquired in the name of a *minor*, for while an infant has no capacity to sue, a party having received his goods or his services cannot avail himself of the infancy to avoid payment. This is well established. (*Van Bramer vs. Cooper*, 2 *John.*, 279; *Hartness vs. Thompson*, 5 *John.*, 160; *Gates vs. Davenport*, 29 *Barb.*, 160; *Whitmarsh vs. Hall*, 3 *Denio*, 375.)

7. An assignee of a claim under the statute cannot acquire a lien by subsequently filing the notice in his own name. (*Roberts vs. Fowler*, 3 *E. D. S.*, 632.) The statute confers only a personal right, (*Id. Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284; *Rollin vs. Cross*, 45 *N. Y.*, 766.*)

8. If the assignment of the debt is made before notice filed it may be filed afterwards in the name of the assignor, and be valid, and the assignee may enforce it. (*Hallaghan vs. Herbert*, 11 *Abb.*, *N. S.*, 326.)

9. An assignee of a claim is not authorized under the statute to file a lien unless such assignment is for the benefit of the assignor, to be held by his agent so that the lien may be preserved. (*Rollin vs. Cross*, 45 *N. Y.*, 766.)

10. It has been impliedly held that two joint contractors might relinquish and give up to the co-contractor all their joint interest in the claim, and that a notice subsequently filed in his individual name might be valid. In such case, the notice must show all these facts. (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

11. On the principle of the decisions above cited, it would seem that on the death of a party no lien could be perfected by his representatives filing a notice as claimants under the act. A surviving partner in such case perfected a lien. (*Westervelt vs. Levy*, 2 *Duer*, 354.)

12. A lien can only attach for labor performed and materials furnished by the party claiming it, including labor performed by persons employed by him and materials purchased by him on his own credit and used in the construction; but it does not extend to materials or labor (although actually paid for by the

* The right to acquire a lien at common law cannot be assigned. (5 *Term R* 606.)

claimant) procured by him as the agent for the owner, and in his name and on his credit. (*Kirby vs. Daly*, 45 N. Y., 84.)

13. The contractor cannot assign or transfer his interest in the contract so as to cut off the right of persons to file liens. (§ 13, *Devlin vs. Mack*, 2 *Daly*, 94.) See *post* as to who is owner, and who contractor.

14. A contractor may make a *bona fide* legal or equitable assignment of a payment due or coming due to him on the contract, and a lien subsequently filed will not cut it off or reach it. (*Young Stone Co. vs. Wardens, &c., St. James*, 61 *Barb.*, 489.)

15. As to assignment of future earnings, see *Cooper vs. Douglass*, 44 *Barb.*, 409.

16. A general assignment for the benefit of creditors by a contractor, after making a contract providing for payment after the completion of a building, does not operate to change the relation between the sub-contractor and the owner. The sub-contractor can acquire a lien after the assignment as well as before if such contract was not completed at the time of the assignment. (*Ct. of Appeals, Mandeville vs. Reed*, 13 *Abb.*, 173.)

17. Where a contractor having made an assignment with the consent of the owner, and at that time the sub-contractor had filed his lien, there was nothing due to the contractor, but the owner detained from the contract price the amount of the lien, and under an agreement with the assignee completed his work as contemplated by the original contract, it was held that the sum so withheld must be applied to the lien (*Henderson vs. Sturgis*, 1 *Daly*, 336.) The court said: "The contract between them (the contractor and the owner) being an entirety, and the work not having been done, no lien could have been acquired on the 5th of October, 1861, unless the contract had ceased to continue by some act of the parties or by operation of law. The effect of the failure of the contractors and assignment by them was to prevent the plaintiffs from proceeding with their work, and the contract was at an end. (See *Belshaw vs. Colie*, 1 *E. D. S.*, 213.) And in this respect this case is analogous to *Dennistoun vs. McAllister* (4 *E. D. S.*, 729), in which the plaintiff recovered against the owner the amount of his claim, although it was proved that he had not performed

“his work, such performance having been prevented by the “contractor.” (*Henderson vs. Sturgis*, 1 *Daly*, 336.)

18. Whether a transfer of the contract or the amount due under it by *operation of law*, to wit, bankrupt proceedings, would deprive a person of the right to acquire a lien, is yet an unsettled question; probably it would. (See 3 *Bank Reg.*, 81.)

19. The *death* of the contractor does not prevent the acquiring of a lien by a notice subsequently filed. (*Telfer vs. Kierstead*, 9 *Abb.*, 418.)

20. Taking a *note* or any *security*, or the *recovery* of a *judgment* for the *debt*, does not of itself prevent the lien from attaching by the subsequent filing of the notice. (*Althause vs. Warren*, 2 *E. D. S.*, 657; *Teaz vs. Chrystie*, 2 *E. D. S.*, 621; *Miller vs. Moore*, 1 *E. D. S.*, 739.)

CHAPTER II.

FOR WHAT A LIEN MAY BE ACQUIRED.

21. To obtain a lien, the labor performed or materials furnished must be *used* “towards the erection of or in altering, “improving or repairing of any building or buildings or the “*appurtenances* thereto” (§ 1).

22. The term “*appurtenances*” is used precisely as it was in the law of 1844 and 1851. Under the law of 1844, the Court of Appeals held (*McDermott vs. Palmer*, 8 *N. Y.*, 383) that “the “term ‘*appurtenances*’ may perhaps include, without any “forced construction, the yard and sidewalk; and work and “labor performed and materials furnished for such *appurtenances* are probably within the spirit of the statute.”

Again, “The right of lien extends to all such materials as or-
“dinarily enter into or are used in the construction of build-
“ings, and which are within the express or implied terms of the
“building contract made between the owner and contractor.”
(*Hazard Powder Co. vs. Byrnes*, 12 *Abb.*, 469; and citing *Wood vs. Donaldson*, 17 *Wend.*, 550, and *McDermott vs. Palmer*, 8 *N. Y.*, 383.)

23. The general rule is, that whatever would be regarded as immovable between grantor and grantee is a fixture (an appurtenance), and therefore a lien would attach for such work, materials, &c. (*Ombony vs. Jones*, 19 N. Y., 234; *affg.* 21 Barb., 520.)

24. Repairs are fixtures, and become part of the realty. (*Johnson vs. Hunt*, 11 Wend., 136.)

25. Repairs to mere personal property, to wit, furniture, no lien can be obtained.

26. The act contemplates to cover whatever is a legal appurtenance, and also all that is *used as an appurtenance*, although it may not be such in the legal acceptation of that term. A yard, or garden, or stable or other building may be an appurtenance to a house, although it may consist of one or more distinct city lots. It may, therefore, be a question of fact in some cases whether or not it was used as an appurtenance. If it was, a lien will cover not only the house and lot upon which it stands, but those *used* as an appurtenance to it.

As to what is a legal appurtenance to real property, see Abbott's Digest, title "Fixtures" and "Deed."

27. A lien may be acquired upon a claim for furnishing to the contractor *hoisting apparatus and labor in the use of it upon the erection* of a building. (*Dixon vs. La Farge*, 1 E. D. S., 722.)

28. Also for *lightning-rods* furnished, and the labor in attaching the same. (*Quimby vs. Sloan*, 2 E. D. S., 595.)

29. Where a building contract required the rock upon the land to be *blasted* and removed, preparatory to building, *powder* and *fuses* necessarily used for that purpose was held to be within the term "materials in building" within the law of 1851. (*Hazard Powder Co. vs. Byrnes*, 12 Abb., 469.)

30. A lien may be obtained for constructing a *sewer*. (*Devlin vs. Mack*, 2 Daly, 94.)

31. In 1870 (ch. 529, *ante* p. 11) the law was extended in certain cases to railroads, and in 1872 it was extended so as to apply to work and materials on wharves, piers, bulkheads and bridges and structures connected therewith. (Chap. 669, *ante*, p. 11.)

32. Where materials are furnished for *several buildings upon*

adjacent lots, under one contract for the construction of all, a single lien charging the whole debt upon all the buildings is proper (*Paine vs. Bonney*, *E. D. S.*, 734), and in such case the lien holder is entitled to be paid out of all or any of the houses. (*Id.*) Where a lien upon seven houses had been prosecuted to judgment and sale for materials furnished under an entire contract, it was held that the lienholder was entitled to the payment of the full amount of his lien, from the surplus moneys arising upon the foreclosure and sale of part of the houses under a prior mortgage. (*Livingston vs. Miller*, 16 *Abb.*, 371.)

33. Where, under a single contract, the lienor had furnished materials to the owner, equally for *seven* houses, and one of such houses had been conveyed away by the owner before the filing of the notice of lien, it was held that the lien was valid as a lien upon the remaining *six houses only* for their proportionate part of the whole claim (*six-sevenths*), although some payments had been made by the owner on general account. (*McAuley vs. Mildrum*, 1 *Daly*, 396.)

34. Such property, both real and personal, as is devoted to public use and belonging to the corporation of New York city, such as public school-houses, public edifices or the public parks or grounds, or such as are legally pledged for the payment of its debts, are public property devoted to specific public uses, and are therefore exempt from sale on execution, and therefore cannot be sold on a judgment in lien proceedings (*Brinkerhoff vs. Board of Education*, 6 *Abb.*, *N. S.*, 428, affirmed as *Poillon vs. The Mayor*, 47 *N. Y.*, 666.)

35. This lien was by a sub-contractor, and under the law of 1851-55, and under it no personal judgment could be rendered against the owner in favor of a sub-contractor. (*Quimby vs. Sloan*, 2 *E. D. S.*, 595; *Walker vs. Paine*, *E. D. S.*, 624; *Cox vs. Broderick*, 4 *E. D. S.*, 721; *Dennistoun vs. McAllister*, 4 *E. D. S.*, 729; *Grogan vs. McMahon*, 2 *E. D. S.*, 754; 1 *Crary's Prac.*, 624.)

36. The object and effect of this statute is simply to take from the owner money actually owing by him upon his contract, and apply it in payment for the labor and materials which sub-contractors or material men have contributed towards the comple-

tion and performance of the same contract. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Sullivan vs. Brewster*, 1 *E. D. S.*, 699; *Ferguson vs. Burke*, 4 *E. D. S.*, 760; *Loonie vs. Hogan*, 9 *N. Y.*, 435; *Donaldson vs. Wood*, 22 *Wend.*, 395.)

37. It would be proper, therefore, to hold now that a lien filed on public property exempt from sale on execution, would have the effect to transfer to the lienor any money due from the city on account of the contract, and give a general judgment therefor.

CHAPTER III.

TIME OF FILING NOTICE.

38. The *time* within which to file the notice is at any period "before the whole work is completed and within *three months* "after the work is done, or the materials furnished for which a "lien is sought, if the work is then finished or abandoned, &c." (§ 6.)

39. By the law of 1872 where a lien is sought upon *wharves, piers, bulkheads and bridges*, and *structures* connected therewith, the time of filing the notice is limited to *thirty days*. (*Chap. 669.*)

40. The *period* of when the *time commences to run* is very important. If the notice is not filed at the proper time no lien is acquired. (*Donaldson vs. O'Connor*, 1 *E. D. S.*, 695; *Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Lutz vs. Ely*, 3 *E. D. S.*, 621; *Hauptman vs. Catlin*, 20 *N. Y.*, 247; *Spencer vs. Barnett*, 35 *N. Y.*, 94; *Hubbell vs. Schreyer*, 14 *Abb., N. S.*, 284.)

41. In cases where the work has been furnished for a *long time continuously*, or where there has been a *running account*, and where there is no specific time or amounts in which payments are to be made, such questions must be determined by *analogous cases* where similar question arise.

42. Where the contract price is payable in *installments*, the time does not begin when each installment becomes due under

it, but when the *entire contract* is completed. (§ 6 ; *Webb vs. Van Zandt*, 16 *Abb.*, 190.)

43. The Court of Appeals (*Spencer vs. Barnett*, 35 *N. Y.*, 94) held that under the lien law for Kings County (*Laws* 1853, *Chap.* 335) providing that a notice of lien must be filed within sixty days after the *materials* were furnished, a lien for materials cannot be acquired as to any which were furnished more than sixty days before the filing unless furnished *under a contract* under which other items specified in the notice were furnished within the sixty days. This case was held to apply in principle to the law of 1863. (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

44. When *separate items* have been furnished according to order, but not under one entire contract, *each of them* is to be regarded as a separate contract, and the time in which to file a lien therefore begins to run on the delivery thereof. (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284) A *payment* on general account would not have the effect to extend the time in these proceedings, it only applies to the Statute of Limitations.

45. Where there are *several items* of account for goods sold, or work performed at different times, there must be either an *express contract*, or the circumstances must be such as to raise an *implied contract*, embracing all the items, to make them a single or entire demand. (*Secor vs. Sturgis*, 16 *N. Y.*, 548.)

46. Demands arising out of *separate sales* made at separate dates, and upon credits expiring at different times constitute independent contracts. (*Cashman vs. Bean*, 2 *Hilton*, 340.)

47. Where, under a *parol contract* for the future delivery of a fixed quantity of goods at such times and in such parcels as might be required, *separate deliveries* are made and settled for as furnished ; each delivery is to be considered as in its nature a separate and distinct contract. (*Deming vs. Kemp*, 4 *Sand.*, 147.)

48. A question may arise whether the filing of the notice by the *sub-contractor* is governed by the completion or abandonment of the contract by the owner or by his individual dealings with the contractor. The period which the contractor has is

plain ; the object of the limitation is to prevent the accumulation of stale demands.

The work or materials "for which a *lien is sought*" must have been furnished within three months after the completion of the contract or such work was finished or abandoned. (§ 6.)

49. A lien will attach *before* anything has *become due* from the owner to the contractor. It is sufficient if money may become due *afterwards* which the owner may be compelled to apply to the satisfaction of the lien. (§ 6, *Doughty vs. Devlin*, 1 *E. D. S.*, 625 ; *Pendleburg vs. Meade*, 1 *E. D. S.*, 728.)

50. It is not necessary that the claim of the *sub-contractor* from the *contractor* should be actually due in order to acquire a lien. (§ 6 ; *Miller vs. Moore*, 1 *E. D. S.*, 739 ; *Pendleburg vs. Meade*, 1 *E. D. S.*, 728.)

51. It has been held (*Devlin vs. Mack*, 2 *Daly*, 94) that a claimant is entitled to file his notice as soon as he *commences the work*, for then he has an *equitable lien* therefor which is valid against all excepting *bona fide* transfers and *bona fide* incumbrances. This question has not been affected by the law of 1866.

52. Section 6 would seem to contemplate that a notice could be filed for work and materials thereafter *to be rendered or furnished* under a contract, expressed or implied. It says that "*at any time before* the whole work is completed, &c."

53. If notice is filed for work, &c., to be thereafter finished, *no priority* over other liens of the *same class* could be obtained thereby, only for the amount actually delivered, &c., up to the time of the filing of the latter notices. That is the rule as to judgments by confession to secure future indebtedness. (*Brinkerhoff vs. Marvin*, 5 *John. Ch.*, 320.)

54. If the owner conveys the premises in good faith before the notice of lien is filed, the *right to perfect* a lien is lost. The law on this point is now, by the amendment of 1866 (§ 1), similar in effect to the law of 1851 (§ 1.) So held under that law. (*Crystal vs. Flannelly*, 2 *E. D. S.*, 589 ; *Sinclair vs. Fitch*, 3 *E. D. S.*, 677 ; *Cox vs. Broderick*, 4 *E. D. S.*, 721 ; *Jackson vs. Sloan*, 2 *E. D. S.*, 616 ; *Quimby vs. Sloan*, 2 *E. D. S.*, 594 ; *Noyes vs. Burton*, 17 *How.*, 449 ; *Livingston vs. Miller*, 16 *Abb.*,

371 ; *Ernst vs. Reed*, 49 *Barb.*, 367 ; *Oates vs. Haley*, 1 *Daly*, 338 ; *Meehan vs. Williams*, 36 *How.*, 73 ; *Mushlitt vs. Silverman*, 50 *N. Y.*, 360, 1 *Crary's Prac.*, 619.)

55. If the transfer is *bona fide*, although *with notice* that liens may be filed for unpaid claims for work, &c., still no lien subsequently filed will attach, even though the grantee at the time of purchase *assume the payment* of said claims. (*Sinclair vs. Fitch*, 3 *E. D. S.*, 677 ; *Quimby vs. Sloan*, 2 *E. D. S.*, 594.)

56. A *bona fide agreement to sell* the property does not have the effect of an actual conveyance, and therefore a notice of lien subsequently filed before the giving of the deed would attach and have a preference over it. The term conveyance does not include executory contracts for the purchase of lands. (3 *R. S.*, 59, § 70.)

57. A notice may be *filed after transfer or incumbrance* for the purpose of foreclosure proceedings to *contest the validity* and *bona fides* of such transaction. (*Meehan vs. Williams*, 36 *How.*, 73 ; *Schafer vs. Reilly*, 50 *N. Y.*, 61 ; *Bailey vs. Johnson*, 1 *Daly*, 61 ; *Quimby vs. Sloan*, 2 *E. D. S.*, 594.)

CHAPTER IV.

LIEN, ON WHAT AND EXTENT.

58. The lien is only against *the premises* to the extent of the right, title and interest then existing of *the owner* of the "house or building, and the appurtenances and lot on which the same shall stand" § (1, *amd.* 1866.)

The extent of *the land* that would be bound by a lien is important. A yard or garden or stable or other building may be an appurtenance to a house, although it may consist of one or more distinct lots. Therefore, a lien upon a house for work, &c., will cover not only the lot upon which the house stands, but other lots if they are *used as an appurtenance* to the house. (*See ante*, 26).

59. The party whom the act contemplates as the *owner* is not always the party who is the owner in the ordinary acceptance of the term. The present act is no different in this particular (except § 14), than the previous laws. *Owner* means the *contracting owner*. (*Cox vs. Broderick*, 4 *E. D. Smith*, 721; *Quimbey vs. Sloan*, 2 *E. D. S.*, 594.)

60. The General Term of the Supreme Court says: "the word owner as used in the statute is the correlative of contractor. It means the person who employs the contractor, and for whom the work is done under the contract." *McDermott vs. Palmer*, 11 *Barb.*, 9.

61. The one for whom a building is erected, and who is to pay for it, though he has not the legal title, but only an equitable interest in the land, may be the owner.* *Ombony vs. Jones*, 19 *N. Y.*, 234; *Loonie vs. Hogan*, 9 *N. Y.*, 435; *Rollins vs. Cross*, 45 *N. Y.*, 766; *Hallaghan vs. Herbert*, 11 *Abb. N. S.*, 326.)

62. The owners will generally be (1), the owner of the fee; (2), an estate for years; (3), an estate for a single year or less; (4), an estate at will.

63. The most *difficult and frequent* questions as to ownership arise in the various relations of landlord and tenant agreements—*lessor* and *lessee*.

The questions that may arise under this branch of the subject, that is, who should be deemed the *owner* or *contractor*, the *lessor* or the *lessee*, or *both*, may be analyzed as follows:

(1.) When the lessee is required by the terms of his lease to make all repairs or erect buildings, thereon, besides paying the specified amount of rent for the specified term.

* On the strength of this principle, when a claim is made by a sub-contractor some may argue, "the work was done for the contractor, therefore, he is the owner, and only *his* interest is liable;" and to a claimant of a sub-contractor they, with the same logic, may say, "you did the work for the sub-contractor and therefore he is the owner, and only *his* interest is liable." The true test of ownership in cases of vendees, lessees and contractors is to ascertain what remedy if any, they would have against the vendor, lessor or contracting owner, if the latter declined to carry out his part of the agreement after the vendee or lessee or contractor had complied with his portion of the agreement. But see the authorities on this question.

(2.) When such repairs are for the benefit of the lessee only, and he receives the advantage of them during his term—such as ordinary wear and use of house.

(3.) When the repairs required are of such a nature or made at such a time that the lessor would or does derive the entire benefit and advantage of them—for instance, in case a lessee should be dispossessed by the lessor for non-payment of rent immediately after the repairs were made.

(4.) When the required repairs &c., are of a temporary nature, and solely for the benefit of the lessee.

(5.) When they are of a permanent nature, and solely for the benefit of the lessor.

(6.) When the required repairs are for the mutual benefit of both lessor and lessee, and by agreement belong to the lessor at the expiration of the term.

(7.) When the required repairs are for the mutual benefit of both lessor and lessee, and by agreement are to be made before the term commences, and are to belong to the lessor as soon as completed.

(8.) When the repairs are to be made at the joint expense of both lessor and lessee, and when the lessor is to allow a specific sum out of the rent for such repairs.

(9.) When the repairs are permitted to be made by the lessee, although they were permanent, and the lessor is afterwards to reap the benefit of them.

(10.) When the lessee may be deemed as merely acting as agent or contractor for the lessor, and when not.

(11.) When such things as are removable as between landlord and tenant, whether a lien can attach the tenant's interest or be regarded as personal property only.

(12.) When such things as are not removable as between landlord and tenant, what lien can be acquired, and against whom?

(13.) When the same is an executory contract, contingent upon any of the foregoing requirements, and when it is an absolute lease.

65. Under all laws *previous* to that of 1863, most of these questions would present some embarrassments in trying to render justice under a statutory proceeding where equity was not recognized by the statute. But the law of 1863 has provided for *solving all those questions according to justice and right*, by adopting equity jurisprudence as a basis of this system.

It is provided that "the court shall proceed without regard "to matters of form which shall be amendable at all times "while the proceedings progress, without costs, and *judgment* "shall be rendered according to the equity and justice of the "claims of the respective parties." (§ 5.)

In fact, the entire tenor of the act is founded upon *equity* as it shall appear between the different parties. It would seem that at this age of the world all equitable questions could be equitably decided by the courts. *

66. It was held in effect (*McMahon vs. Tenth Ward Sh., 12 Abb., 129*) that where a building was erected upon land, the party entitled to the *reversion* should be deemed an owner, and be made a party to the proceeding, as well as the party who was entitled to the immediate use of it.

67. Where a sub-tenant erects a building upon the demised premises, which he has the right to *remove* at the end of his term, he is deemed the owner of the building, and the proceeding may be instituted against him. (*Ombony vs. Jones, 19 N. Y., 234.*)

The lien would extend to his interest in the building, and also in the land, if he has any. (*Id.*)

68. When the *lessee is to make repairs or erect a building pursuant* to his lease or executory agreement with his lessor, and

* In our day equity is said to be as strict and as well defined as the law, and its principles as binding; and when the well-established principles of equity are departed from in our courts, we are reminded of what was said of it more than 200 years ago, in the time of the quaint John Selden. He tells us in his Table Talk:

"Equity is a roguish thing; for law we have a measure, know what to trust to; "equity is according to the conscience of him that is chancellor, and as that is "larger or narrower, so is equity. 'Tis all one as if they should make the stand- "ard for the measure we call a foot a chancellor's foot. What an uncertain meas- "ure would this be? One chancellor has a long foot, another a short foot, a third "an indifferent foot. 'Tis the same in the chancellor's conscience."

the lessor is to have them *after the expiration of the term*, however short, the lessee only is regarded as the owner, and the lessor's interest (although accruing after notice filed) cannot be affected by a lien filed for work or materials furnished pursuant to such agreement. (*Knapp vs. Brown*, 45 N. Y., 207; more fully, 11 Abb., N. S., 118.) *

* The facts in this case do not fully appear in the report. They were as follows:

The respondent, Jackson, being the owner in fee of certain premises in New York city, made a written executory agreement, wherein defendant, Brown, covenanted to make certain alterations and to erect a new building and furnish materials, all as fully specified and described as any builder's contract could be, said Brown was to have it all completed within three months from May 1st, 1867, under penalty of forfeiture, and was to have the use of the premises and buildings for five years from said May 1st, 1867, and to pay the sum of fourteen hundred dollars per year, payable monthly, and during said term; and "at the expiration of the said term the said Brown will go out and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and that all additions and improvements made by the said Brown shall be left on the said premises."

This agreement was signed by both Brown and Jackson, and recorded. (See *Liber* 1013, p. 289.) Brown took the agreement to the plaintiff, Knapp, who thereupon agreed to do all the building, &c., that was required of Brown by the agreement for \$2,200. Knapp proceeded with the work, and payments were made, and on the 24th of July, 1867, Knapp filed a lien on said premises for a balance due him from Brown of \$1,800 for work and materials furnished under said agreement. The notice of lien named Jackson as owner, and Brown as owner and contractor. In this action to foreclose the lien, the complaint alleged all the above facts and set forth a copy of the agreement between Jackson and Brown, and made them both parties defendant. No other lease was executed between the parties.

The plaintiff demanded judgment directing a sale of the interest of the defendants, Jackson and Brown, in the premises and building and appurtenances to the extent of the right of said Jackson and Brown on the 24th day of July, 1867.

The defendant, Jackson, admitted in her answer that she was the owner of the property, and admitted the making of the agreement with Brown, but the other allegations of the complaint were to be proved.

After issue was joined, Brown offered to allow judgment against himself for \$1,020; this the defendant declined, and proceeded with the trial before a referee, and after plaintiff had rested, the referee, on motion, dismissed the complaint as to Jackson without costs, and plaintiff proceeded as against Brown, and recovered a judgment for \$966, being less than the offer.

The plaintiff appealed from the judgment dismissing the complaint as to Jackson; the referee's decision was affirmed by the Common Pleas General Term, and was then taken to the Court of Appeals and was there affirmed. (See *Court of Appeals Cases*, Vol. 171, March Term, 1871, *Knapp v. Brown*, at *Library of N. Y. Law Institute*.)

The opinion of the Court of Appeals, upon this point, is as follows :

“ From the facts proved it appears that Mrs. Jackson was the owner of the premises, and leased the same to Brown for a term of years, at a specified rent, and that the latter, in addition to the payment of the rent, covenanted with her to make, at his own expense, certain specified repairs to and altering of the building upon the premises, which were to be left upon the premises by him at the expiration of the term ; that Brown employed the plaintiff to furnish the materials for and do the work upon the repairs and alterations.” * * * *

“ Mrs. Jackson was the owner of the reversion of the premises, and would be entitled to the possession of the same upon the expiration of the term of Brown. By the construction of this section no lien can be created upon the interest of any person, as owner of the premises, except such person shall either himself or by his agent enter into a contract for doing the work, either express or implied, as the lien is only authorized as against owners so contracting for or employing persons to do the work ; that this is the true construction is manifest, not only by the language of the section, but by section 14 of the act. The latter section provides that, for the purposes of the act, any person or persons who may have sold or disposed of his or their lands upon an executory contract of purchase, contingent upon the erection of buildings thereon, shall be deemed the owner, and his vendee the contractor, and said owner shall in all respects be subject to the provisions of the act. This provision was necessary to secure to material-men and others, to whom such vendee might become indebted in the construction of such buildings, the benefit of a lien upon the land ; but it would have been unnecessary for this purpose had the interest of the vendor been subject to the lien created by the act to such persons by virtue of the first section. Section 9 of the act leads to the same conclusion. That section provides that the contractor shall be personally liable to the lienor for the whole amount of his indebtedness, and the owner to the extent of the amount due by him to his contractor. This, although confined to the personal liability of

“ the parties, shows that, to authorize the lien, there must be
 “ an employment by the owner to create any liability against
 “ him under the act. In the present case there was no em-
 “ ployment of the plaintiff by Mrs. Jackson ; she was in no
 “ respect indebted to Brown for or on account of the work ;
 “ she had conveyed to him an interest in the land in part for
 “ the consideration of his doing the work. He, alone, em-
 “ ployed the plaintiff to do the work ; he was the owner within
 “ the act, and his interest in the premises only is made subject
 “ to a lien by the act. This is no hardship upon the plaintiff.
 “ He, before entering into the contract, could readily have
 “ ascertained the extent of Brown’s interest in the premises,
 “ and, consequently, the adequacy of the lien as security. The
 “ judgment must be affirmed, as to Jackson, with costs.” *

69. Where a *lessee* is to make *improvements* by *advances* made by the *lessor* for that purpose, and the improvements are to *belong to the lessor* at the expiration of the term, the lessee is deemed to be the owner, and only his interest in the property is affected by the filing of a notice of lien by a contractor for such improvements. (*Stuyvesant v. Browning*, 1 J. & S., 203 ; see § 14 of the act in connection with the authorities cited in this case.†)

70. As to who is deemed the *owner* in case of *leases*, it may be stated that whatever property is movable as between landlord and tenant, by law or by agreement, expressed or implied, the tenant is deemed the owner as to that.

71. As to what the law regarded as *fixtures* between landlord and tenant, without any agreement, see *Ombony vs. Jones*, 19 N. Y., 234.

* In regard to the questions arising between lessor and lessee, compare the general principles of equity jurisprudence as stated in Story’s Eq. Jurisp., §§ 799 b, 1234 to 1239 and authorities there cited.

† The following decision is from the *N. Y. Times* of March 31st, 1867, and as it has never been elsewhere reported, it is inserted in full :

Chapin vs. Stewart and others.—This action was for the foreclosure of mechanics’ liens against the New York theatre for materials furnished by the plaintiffs at the request of H. H. Davis, who had an agreement in writing, dated November 30, 1865, with A. T. Stewart, which agreement contained the following clauses :

“ In consideration of the sum of \$750, paid by Davis to Stewart on the execution and delivery hereof, Stewart agrees to and hereby does let and rent unto said

As to when a "shanty" may be regarded as a fixture, see *Fisher vs. Saffer*, 1 E. D. S., 611.

72. Where a tenant is to make specified repairs as a part of the rent, and is dispossessed for non-payment of rent after the repairs are made, but before notice filed, it would seem under the decisions, which regard the tenant as the owner only (*Knapp vs. Brown*, 11 Abb., N. S., 118 ; *Id.*, 45 N. Y., 207) that no lien could be acquired by a notice subsequently filed, as the tenant had no interest in the property. Perhaps in such case a notice could be filed and the right of the lienor to be subrogated in place of the tenant might be asserted.

"Davis the building known as the (late) Church of the Messiah, situated on Broadway, opposite the New York Hotel, in said city, for the term of two weeks, commencing on December 10, 1865, and ending on December 24, 1865. Possession of said premises shall, however, be given to Davis on December 3, 1865, with the privilege of making such alterations thereon, subject to the approval of said Stewart or his agent, as shall not depreciate the value of said building."

"In making such alterations, Davis may use the scenery, materials, &c., so far now on the premises, it being understood and agreed that the changes contemplated in the interior of said building are only such as will adapt it to the purposes of a first-class theatre, similar to Niblo's Theatre."

"Davis agrees to hire and take said church or building upon the terms and conditions aforesaid, to adapt it to the purposes aforesaid, at his own cost and expense, and at the expiration of said term surrender the possession of said building and premises to said Stewart, with all the alterations, additions and improvements made thereon, without any charge whatever therefor."

The agreement then gives Davis the privilege, "at the expiration of said term and surrender as aforesaid," of renting the theatre up to May 1, then next, for the sum of \$750 for every two weeks, payable in advance.

No new matter was set up in the answer. The defendant offered no evidence, but relied entirely upon the terms of said agreement between Davis and Stewart.

On the trial of the action before the referee, said agreement was produced on the part of plaintiffs and read in evidence, and a notice of lien filed January 18th, 1866, in favor of plaintiffs, for materials furnished to Davis, was also produced by plaintiffs and read in evidence.

Plaintiffs then offered to prove that the materials mentioned in said notice of lien, and in the complaint and bill of particulars, were furnished to Davis between December 11th, 1865, and December 23d, 1865, and the value of them, and that said materials were used by Davis in the alterations made by him in pursuance of and in conformity with the terms of said agreement, and that the building was completed at the time required by said contract.

Such evidence was excluded by the referee (to which plaintiff's counsel excepted), and the complaint was thereupon dismissed.

The following is the opinion given by the referee, Hon. J. S. BOSWORTH, on deciding the case:

By Chap. 500 of Laws of 1863 (p. 859), any person owning a lot of land in the

If the notice was filed *before* the tenant was dispossessed, and without notice to the lienor, he could be substituted and acquire all the rights which the tenant had when the lien was filed. (*Ombony vs. Jones*, 19 N. Y., 234.)

73. A lien will attach the interest of any person who in contracting *holds himself* out as owner. (*Ombony vs. Jones*, 19 N. Y., 234.)

74. In the case of joint owners, the share of the *contracting one* would be bound, and in the case of tenants in common, the estate of the contracting tenant. (*Id.*; *Otis vs. Cusack*, 43 Barb., 546.)

city of New York, and building thereon, cannot have his estate and interest therein subjected to any lien in favor of any person performing labor or furnishing materials toward the erection of, or in altering, improving or repairing such building, or the appurtenances thereto, unless such labor was performed or materials furnished "in pursuance of or in conformity with the terms of" a contract with or employment by the owner of such lot and building with some person therefor, or unless such labor was performed and such material furnished "by or in accordance with the direction of the owner or his agent" to some person to perform the work or furnish the materials. (*Laws of 1863*, p. 859.)

The person in whose favor such liens may be acquired are only those "who shall be employed by any owner, contractor, sub-contractor, jobber or master workman, in manner aforesaid." (*Id.*)

The words "in manner aforesaid" refer to the preceding parts of that section, which require that the labor must be performed or the materials furnished "in pursuance of or in conformity with the terms of any contract with or employment by the owner, or by or in conformity with the directions of the owner or his agent."

The interest of the owner cannot, therefore, be subjected to a lien for any labor performed or materials furnished, unless he contracted with or employed, or personally or by his agent directed some one to perform the labor or furnish the materials, and the labor has been performed or the materials furnished in pursuance of or in conformity with the terms of the contract or employment, or in accordance with such direction. It seems to me entirely clear that this is the meaning and intent of the statute. It is equally clear that the defendant Stewart, judged by the evidence given or offered to be given, did not employ or direct the plaintiffs, or any other person, nor contract with them or any one else, to furnish the materials in question.

The direction was given by H. H. Davis, and by him only. Is there any just ground for holding him to be the agent of Mr. Stewart in that matter, and that therein he was acting for Stewart as his principal, and not on his own behalf and account? This question depends for its solution upon the legal effect of the agreement between him and Mr. Stewart, dated November 30, 1865, and upon the nature of the relation between them which was thereby established.

That agreement contains, first, a letting of the premises to Davis for two weeks, commencing December 10, 1865, and contains a covenant to lease from time to

75. In some cases a contract made by one tenant in common would *bind* the interest of *all*. (*Story's Eq. Jurisp.*, § 1234, § 1235.)

76. An *equitable lien* may be acquired upon general principles for repairs, benefits and improvements upon real property in certain cases. (*See Story's Eq. Jurisp.*, § 799, and §§ 1234 to 1239.)

77. A party who would have an *equitable lien* upon the property for repairs, benefits and improvements, &c., may be

time for consecutive terms of two weeks each up to the 1st of May, 1866, on a compliance by Davis with the terms and conditions therein stated.

By that agreement Davis had "the privilege" of making alterations in the building, which should "not depreciate the value of such building," subject to the approval of Mr. Stewart or his agent. Davis was restricted in respect to the changes and alterations in the building which he had "the privilege" to make, to such, and only such, as would "adapt it to the purposes of a first-class theatre "similar to Niblo's Theatre."

He was to make these changes and alterations, not for Stewart, but for himself, "at his own cost and expense." If, perchance, the building, when altered by Davis, at the end of his lease should be more valuable solely by reason of the alterations made by him, the cost of this addition to the building or the increased value of the building by reason thereof, is a part of the compensation which he covenants to make for the use of the premises.

But whatever the costs of the changes might make, it does not necessarily follow that the market value of the building or the value of its rental would be thereby increased.

The provision in the lease that any alterations or changes in the building which Davis might attempt to make, "were to be subjected to the approval of said "Stewart or his agent," did not make the relation between Mr. Stewart and Mr. Davis other than that of lessor and lessee, with the privilege to the lessee to make alterations at his own cost and expense, with a view to the better adaptation of the premises to the purposes and business for which it had been rented.

By securing to Mr. Stewart the right to disapprove of any attempted changes and alterations, and put a stop to them, it was by agreement left to him or to his agent to determine whether such changes would be unauthorized by the terms of "the privilege" granted by the agreement to Mr. Davis. Neither that provision, nor that with all the other clauses of the agreement, constituted Mr. Davis the agent of Mr. Stewart in making alterations and changes under the privilege in that behalf secured to him by that agreement.

If a case could be made showing that the agreement was fraudulent and collusive in respect to the alleged leasing, with the privilege of making alterations, and that it was made in that form to defeat the just operation of the statute, a different question might arise.

So, too, in the present case, if it was sought by the proceedings to deal with the lessee as being, in respect of and to the extent of his interest, "the owner," and to

deemed a *contractor* under an implied contract, and those engaged under him could obtain a valid lien which could be enforced, under this statute, against the *property*.

78. The statute says that the lien shall be "to the extent of" "all the right, title and interest which the owner shall have" "therein (in the property) at the time of filing the notice of lien" "required by the sixth section of the act, and to no greater extent." (*Laws 1866, ch. 752, § 1.*)

79. This is not to be taken as *literally true*, because, as we have seen, the owner, as defined by the courts, may have had little interest in the property at the time the work was done, and afterwards, but before notice is filed, he may become the entire and sole owner in fee of the property; would a notice then filed be to the extent of his entire interest at the time of filing? Clearly not! this is not the intention of the statute. The statute, as construed by the courts, means that the extent

create a lien on and reach and apply that interest, a different question would also be presented.

This case, if I understand it, presents the naked question whether a lessee with the privilege of making alterations at his own cost and expense, with a view to the better adaptation of the premises to the business for which they were rented, is the agent of the lessor in making such alterations, so that a lien for the agreed price therefor or the cost thereof can be imposed upon the lessor's interest in the premises thus disposed of.

In my view of the statute, this question must be answered in the negative. In this view, the complaint should be dismissed, with costs to the defendant Stewart.

There is no pretence that the plaintiffs were misled by Mr. Stewart or by any one acting for him as to the relations existing between him and Mr. Davis, or that plaintiffs did not understand it when they furnished the materials. As I understand their position, they consider it proper, under the advice of counsel and for their interest, to test the question of Mr. Stewart's liability as owner under the statute first cited; and if unsuccessful, they should pay the costs which they thereby make it necessary for Mr. Stewart to incur.

It is useless to cite decisions to aid a possible future examination of this case by the learned court which has expounded all the statutes in respect to mechanics' liens relating to the city and county of New York. So far as any of these former statutes were similar to the present one in respect to the main question involved in this case, the decisions containing them call for the construction which I have given to the present one (*Heroy vs. Hendricks*, 4 E. D. Smith, 768; *Loonie vs. Hogan*, 5 Selden, 435; 2 E. D. Smith, 681; *Ombony vs. Jones*, 19 N. Y., 234; *Hauptman vs. Catlin*, 20 N. Y., 247).

The appeal taken from the above decision has not yet been decided.

N.B.—It is to be observed that in the case cited in the text, the tenant was not to surrender up to the landlord the improvements until after his term expired; in the latter case, the improvements were to be surrendered as soon as completed, and before his term expired, and was an executory contract.

of the lien on the contracting owner's interest shall not be *greater* at the time the lien is filed than it was when the *work was commenced or completed*. In regard to the subsequently acquired interest in the property, the contracting owner is to be regarded the same as any other third party. (See *post*, 84 and 85.)

80. Where A, owning the fee of land, *agrees* to ultimately convey it to B, and immediately to loan B money to aid in erecting a building thereon, and the latter accordingly proceeds to erect such building, A is not the owner of the building, under the lien law of 1851-55, so that his interest in the premises can be subjected to a lien for the value of work or materials furnished by third parties under the employment of B. (*Walker vs. Paine*, 2 E. D. S., 662; *Hallaghan vs. Herbert*, 11 Abb., N. S., 326.)

81. Under the former statutes on the subject, the vendee in such case was deemed the owner of the premises, and no lien could be acquired against the vendor. (*Loonie vs. Hogan*, 9 N. Y., 435; *Randolph vs. Garvey*, 10 Abb., 179; *Gay vs. Brown*, 1 E. D. S., 725; *Kennedy vs. Paine*, 1 E. D. S., 652; *Miller vs. Clark*, 2 E. D. S., 543; *Walker vs. Paine*, 2 E. D. S., 662; *Cox vs. Broderick*, 4 E. D. S., 721; *Belmont vs. Smith*, 1 Duer, 675; *Hallaghan vs. Herbert*, 11 Abb., N. S., 326, 1 *Crary's Prac.*, 618.)*

82. A notice of lien, filed *before* the giving of the deed in such cases, only affected the title of the vendee. (*Id.*)

83. The statute now declares that "any person or persons who may have sold or disposed of his or their lands upon an executory contract of purchase, contingent upon the erection of buildings thereon, shall be deemed the owner, and his vendee the contractor." (§ 14.)

* The learned editor of E. D. Smith's Reports, in a note to *Miller vs. Clark* (2 E. D. S., 543), says that a careful examination of the cases of *Loonie vs. Hogan* (9 N. Y., 435), *Gay vs. Brown* (1 E. D. S., 725), *Belmont vs. Smith* (1 Duer, 675), *Miller vs. Clark*, 2 E. D. S., 543 (to which may now be added *Rollin vs. Cross*, 45 N. Y., 766, and *Hallaghan vs. Herbert*, 11 Abb., N. S., 326) on the one hand, and of *McDermott vs. Palmer*, 11 Barbour, 9, on the other, will reveal no ground for a difference in principle between them, and then shows that such is the fact, although the Court of Appeals, in *Loonie vs. Hogan*, expressly dissented from the views expressed in the latter case. Section 14 of the present act was for the purpose of counteracting some of the misunderstood decisions on this point, and to restore the well established principles of equity jurisprudence in such cases (see *ante*, 76 and *post*, 106.)

This provision does *not apply* to the *ordinary contract* of sale where the erection of buildings are *not required* by the *terms of the contract*, or contingent thereon.

84. A lien cannot be acquired for work done or materials furnished under a contract with an equitable owner as against one holding the legal title, unless the building is constructed by permission of the latter (under the law relating to Kings and Queens). But if the equitable owner permits the building to be erected, and before lien filed, by the performance of a contract of purchase, becomes the legal owner, the conveyance will be held to relate to the time when the contract of purchase was made and such owner to be within the statute. (*Rollin vs. Cross*, 45 N. Y., 766.)

85. "In the absence of any definition in the statute, it might well be that a person having an equitable title to the land upon which the work was done, and a right to a conveyance of the property, would be regarded as the owner of the land, within the statute, and that the lien under a contract made with a party having such a relation to it would attach to the equitable interest, as upon a contract made with the owner. The vendee, in such contract, is treated in equity as the owner, and many of the incidents to a legal title attach to the interest of a vendee under a contract of sale."—Andrews, J. (*Rollin vs. Cross*, 45 N. Y., 766; see *Smith vs. Gage*, 41 Barb., 61.)

86. The *vendee*, under an ordinary contract, not within the provision of §14, cannot obtain a valid lien under it against the vendor. His remedy is for specific performance or for damages. (*Story's Equity Jurisp.*, § 717.) This provision was made for the protection of persons engaged under the vendee.

87. The vendee's right to perfect a lien in such case will depend, however, upon the *terms and construction* of the contract of purchase—to wit, the nature of the penalty against the vendor. (See peculiar contract, *Randolph vs. Garvey*, 10 Abb., 179.)

88. Where the owner makes a *contract of sale* and agrees to make advances for the purpose of erecting buildings thereon, and when completed to give a deed and take back a mortgage for

such advances and for the purchase-money, and the vendee failed to complete his contract, the vendee cannot be regarded as the equitable owner, and no lien would attach. (*Randolph vs. Garvey*, 10 *Abb.*, 179.)

89. If the owner conveys the premises in good faith *before* the notice of lien is filed, the right to perfect a lien is lost, because he has no interest in the property.

The law on this point, by the amendment of 1866, is now similar in effect to the law of 1851, §1; so held under that law. (*Crystal vs. Flannelly*, 2 *E. D. S.*, 583; *Sinclair vs. Fitch*, 3 *E. D. S.*, 677; *Cox vs. Broderick*, 4 *E. D. S.*, 721; *Jackson vs. Sloan*, 2 *E. D. S.*, 616; *Noyes vs. Burton*, 17 *How.*, 449; *Quimby vs. Sloan*, 2 *E. D. S.*, 594; *Livingston vs. Miller*, 16 *Abb.*, 371; *Noyes vs. Burton*, 29 *Barb.*, 831; *Ernst vs. Reed*, 49 *Barb.*, 367; *Oates vs. Haley*, 1 *Daly*, 338; 1 *Crary's Prac.*, 619; *Meehan vs. Williams*, 36 *How.*, 73.)

90. If the transfer is *bona fide*, although *with notice* that liens may be filed for unpaid claims for work, &c., still no lien *subsequently filed* will attach, even though the grantee assume the payment of such claims. (*Sinclair vs. Fitch*, 3 *E. D. S.*, 677; *Crystal vs. Flannelly*, 2 *E. D. S.*, 583; *Bailey vs. Johnson*, 1 *Daly*, 61; *Quimby vs. Sloan*, 2 *E. D. S.*, 594; *Jackson vs. Sloan*, 2 *E. D. S.*, 616.)

91. Although a *bona fide* deed or mortgage is not recorded until after notice filed, if *delivered* before that time, and if it has a *legal inception*, the right to perfect a lien is lost. (*Quimby vs. Sloan*, 2 *E. D. S.*, 594; *Ernst vs. Reed*, 49 *Barb.*, 367; *Hathaway vs. Payne*, 34 *N. Y.*, 92.)

92. If the owner makes a conveyance and the deed is not *delivered*, or does not take effect until *after* the filing of the notice, the lien attaches and has a preference over the conveyance. (*Id.*)

93. Where a *fraudulent conveyance* is made, a lien may still be acquired, and where the fraudulent grantee is a *party* to the foreclosure, his claim may be tried and adjudicated upon, and judgment given *against him* and the lien enforced. (*Quimby vs. Sloan*, 2 *E. D. S.*, 594; *Meehan vs. Williams*, 36 *How.*, 73; *Bailey vs. Johnson*, 1 *Daly*, 61; *Schafer vs. Reilly*, 50 *N. Y.*, 61.)

94. It is not necessary that the lienor should contest the val-

idity and *bona fides* of the transfer in the proceedings to foreclose the lien. He may obtain a judgment and sell all the right, title and interest which the *contracting* owner had in the property when his lien was filed, and then in an action of ejectment contest the legality of the title of the grantee. (*Ernst vs. Reed*, 49 *Barb.*, 367; *Meehan vs. Williams*, 36 *How.*, 73; *Randolph vs. Garvey*, 10 *Abb.*, 179.)

95. This is the only mode of enforcing liens against fraudulent grantees, when they are foreclosed in the Marine or District Courts, as they have no jurisdiction to try a question of fraudulent transfer. (*Quimby vs. Sloan*, 2 *E. D. S.*, 594.)

96. If the fraudulent grantee transfers the property to a *bona fide* purchaser *before* the lien is filed, the lien will be invalid. (*Noyes vs. Burton*, 29 *Barb.*, 631.)

97. A mortgage executed and recorded, and *without* any *consideration* being paid therefor by the mortgagee, only has life and validity from the time of its assignment and delivery to an *assignee for value*, therefore a notice of lien filed *before* such assignment, has a preference over it, although the lien was not filed until *after* the mortgage was recorded. (*Schafer vs. Reilly*, 50 *N. Y.*, 61.)

98. In *examining* for liens, the period should extend three months *after* the record of a conveyance or mortgage, if within a year, for until the expiration of three months a person may file and obtain a lien for work previously done, although the record may show a previous transfer. (*Schafer vs. Reilly*, 50 *N. Y.*, 61; *Meehan vs. Williams*, 36 *How.*, 73; *Ernst vs. Reed*, 49 *Barb.*, 367.)

99. A deed or mortgage may not take effect as against a lien (although subsequently filed) until a long time after it has been given or recorded. A deed or mortgage must have a legal inception before it will cut off a lien subsequently filed. (*Id.*)

100. A lien for work done by authority of a person who holds the *legal title*, binds the property. (*Anderson vs. Dillaye*, 47 *N. Y.*, 678.) Otherwise, if it is not done by that authority. (*Cox vs. Broderick*, 4 *E. D. S.*, 721.)

101. A *bona fide* purchaser, not having actual knowledge of the lien, is not bound by a lien filed against the *grantor* of 'his *grantor* after the deed giving title to the latter was recorded.

(*Noyes vs. Burton*, 29 *Barb.*, 631. *Quimby vs. Sloan*, 2 *E. D. S.*, 594.)

102. If the owner gives a deed of the property and takes back an agreement, showing the deed to be intended only as a mortgage, a notice subsequently filed will attach the original owner's equitable interest. (*McAuley vs. Mildrum*, 1 *Daly*, 396.)

103. Where a mortgage given by lessee to lessor to secure advances made by lessor under an agreement, to be applied to the improvement of the premises, if the notice of lien for such work is filed before the mortgage, the lien has the priority, but if the mortgage is recorded before the notice of lien is filed, the mortgage has the priority. (*Stuyvesant vs. Browning*, 1 *J. & S.*, 203.)

104. When a mortgage is given for advances thereafter to be made, (such a mortgage is valid, although the limit of the amount is not defined in it. *Robinson vs. Williams*, 22 *N. Y.*, 380.) a notice of lien, when filed, would have a preference over all that was actually advanced after such filing. (*See ante*, 53.)

105. A bona fide agreement to sell the property does not have the effect of an actual conveyance, and therefore a notice of lien subsequently filed against the vendor before the giving of the deed, would attach and have a preference over it, but the amount of purchase-money advanced would have a precedence over the lien. The term "conveyance" does not include executory contracts for the purchase of lands.* (3 *R. S.*, 59, § 70.)

106. If a vendee, holding an executor's contract of sale, which is not within §14, has work done upon the property, the vendor could be made a party to these proceedings upon a lien filed against the vendee, and the vendor's equitable interest ascertained as a prior incumbrancer, and the vendee's interest in the property be directed to be sold, and decree a specific performance of such contract in favor of the purchaser under such judgment sale. (3 *R. S.*, p. 35, §§ 4, 5, 6; *Randolph vs. Garvey*, 10 *Abb.*, 179.)

* A judgment docketed against the vendor in such case would be a lien on the property, while one docketed against the vendee would not be a lien, as the interest of the vendee cannot be sold on an execution. (*Sage vs. Cartwright*, 9 *N. Y.*, 49; see *Smith vs. Gage*, 41 *Barb.*, 61; 3 *R. S.*, p. 35, § 4.)

107. If the *contracting vendor* should dispose of the property *after* contract made, and *before* the work or all of it is completed, and the contractor should proceed with his contract, the property would be liable to the lien subsequently filed for the amount due after the transfer to the grantee. (*Sinclair vs. Fitch*, 3 E. D. Smith, 677), and he, the grantee, would also be personally liable to the contractor for the amount of his contract.

108. In such case, unless the original owner was released, he would still be personally liable to his contractor for the amount of his contract. Although the grantee assumed the contract, he would not be liable in these proceedings for the entire contract, and a *lien* would not attach his interest for the entire contract. (*Id.*)

109. When the *owner* of a house and lot conveys them to *trustees* for the benefit of creditors, no lien can be acquired upon the premises for work done previous thereto, by notice subsequently filed, although filed before the recording of the conveyance. (*Quimby vs. Sloan*, 2 E. D. S., 594; *Jackson vs. Sloan*, 2 E. D. S., 616; *Oates vs. Haley*, 1 Daly, 338.)

110. In such case the court said "that if it appeared that there was a *reservation* in the deed, under which the grantors had a *remaining equitable* interest, which could be bound by the statute, possibly it might be secured by that mode (that is filing notice of lien), but even that is questionable when the whole legal title is gone." (*Quimby vs. Sloan*, 2 E. D. S., 594.)

111. Where a lien has been filed *after* an assignment for the benefit of creditors, and a judgment on the lien, and the property sold on the judgment to a *bona fide* purchaser without notice, who had paid his money and received his deed before the recording of the assignment, the title of such purchaser is valid as against the assignment. (*Quimby vs. Sloan*, 2 E. D. S., 594. *Noyes vs. Burton*, 29 Barb., 631.)

112. Under the more equitable construction of the law of 1863, it is probable that the state courts would hold that a lien could be acquired in *any* case of an assignment for the benefit of creditors, the assignees not being *bona fide* holders of the property, but taking it subject to all equities.

113. Where a mortgage is given and recorded *prior* to the *contract* and the commencement of the work, a lien subsequently filed under such contract would not give the lienor the right to question the validity or *bona fides* of such mortgage (§ 1, see *Story's Eq. Jurisp.*, §634, and *contra* in principle in *Mutual Life Ins. Co. vs. Bowen*, 47 *Barb.*, 618), but he could have the amount due on it ascertained in these proceedings.

114. Where a *mortgagee* in *possession* has work, &c., done, a lien will reach his interest in the property. (*Ombony vs. Jones*, 19 *N. Y.*, 234). If the work, &c., was for necessary repairs, the mortgagor's interest will be liable. (*Quinn vs. Brittain*, 1 *Hoff.*, 353; *Story's Eq. Jurisp.*, §§ 1237, 1238.) But improvements made *without* consent of the mortgagor will not bind his interest. (*Id.*)

115. Where an owner, after work commenced, and before notice filed, *bona fide* transfers the property and *takes back* a mortgage for a part of the consideration money, his interest in the property as mortgagee cannot be reached by filing a lien so as to prevent payments on the mortgage to him, because he has only a chattel interest which has not ripened into either a legal or equitable title. (*King vs. Mech. Ex. Co.*, 5 *N. Y.*, 547.)

116. A *married woman* as owner may be made liable in the same manner as if she was sole, and her *husband* may act as *implied agent* for the wife, and his contract bind her property in certain cases. (*Hauptman vs. Catlin*, 3 *E. D. S.*, 666, *Affd.*, 20 *N. Y.*, 247; *Spencer vs. Barnett*, 35 *N. Y.*, 94; *Meehan vs. Williams*, 36 *How.*, 73.)

117. In regard to *owners* and all *other persons*, the rule must be the same as that in relation to trust estates, that *where a judgment* can be procured in an ordinary action, then the property would be bound by a lien.

118. Where a party who was *guardian* of his infant daughter erected a house upon land owned by her, it was held that he could not as such guardian, without authority from a competent court, build a house upon the land of his ward, and charge the expense upon the ward, or make a builder's contract under which a lien upon the property could be sustained for such building. (*Copley vs. O'Neill*, 57 *Barb.*, 299.)

119. A judgment *docketed* against the owner after work commenced, but before notice filed, would probably not have a preference over the lien subsequently filed for work previously done, and perhaps it would not for work subsequently done, because the claimant has an equitable lien for his entire contract after work commenced, and before notice is filed. (*Devlin vs. Mack*, 2 *Daly*, 94; *Cook vs. Kraft*, 3 *Lans.*, 512; *Dwight vs. Newell*, 3 *N. Y.*, 185; *Rodgers vs. Bonner*, 45 *N. Y.*, 379.)

120. If the property has been *sold* on a judgment a lien subsequently filed would not attach. (*Livingston vs. Miller*, 16 *Abb.*, 371, and *ante*, 111.)

121. In regard to the *record* of all liens on real estate, it is the rule that when the equities are equal the *priority* of record will determine the priority of liens. (*Kaylor vs. O'Connor*, 1 *E. D. S.*, 672. *Shafer vs. Reilly*, 50 *N. Y.*, 61.)

122. If the building is *destroyed* by fire the lien would still attach to the contracting owner's interest in the land, and this whether the notice was filed *before* or *after* the destruction. The lien extends to the owner's interest in the lot—(§ 1. *Ombony vs. Jones*, 19 *N. Y.*, 234.)

123. After the notice is filed the claimant has an *insurable interest* in the building, but he has not until the lien is perfected by the filing of the notice.

124. It has been held that the *death* of the owner will prevent the acquiring of a lien subsequently filed against him, or his representatives. (*Crystal vs. Flannelly*, 2 *E. D. Smith*, 583.)

125. In the case last cited the court, Ingraham, P. J., says, "that there may be cases where such proceedings *may* be instituted *against executors*."

126. It is doubtful if the courts at present would hold that the death of the owner would prevent the acquiring by a subsequently filed notice a valid lien against the property.

127. If the legal *title* of the property is vested in executors by devise, they may be deemed as owners, and a lien can be acquired against the property for a contract made with them. (*Crystal vs. Flannelly*, 2 *E. D. S.*, 583; *Anderson vs. Dillaye*, 47 *N. Y.*, 678.)

128. When work has been done *without authority* of the owner no lien will attach. (*Copley vs. O'Neil*, 57 *Barb.*, 299; *Walker vs. Paine*, 2 *E. D. S.*, 662; *Berry vs. Weisse*, 2 *E. D. S.*, 662. See *post* evidence—the Contract.)

139. *Public property* belonging to the city which is *exempt* from sale on judgment and execution, no lien can attach. So held as to public school house. *Brinkerhoff vs. Bd of Ed.*, 6 *Abb.*, *N. S.*, 128, *affirmed as Poillon vs. Mayor*, 47 *N. Y.*, 666.)

130. But perhaps in such case jurisdiction might be given so as to obtain *general judgment* against the city, and thus reach the amount *due* the contractor. (See *ante*, 37.)

131. The *transfer* or *assignment* by the contractor of his interest in the contract is not valid as against parties entitled to file liens. (§13.)

This provision was not in the former statutes.

133. A contractor may make a *bona fide, legal* or *equitable assignment* of a *payment* due or coming due to him on the contract, and a lien subsequently filed will not reach it. Such transfer is not a transfer of the contract, or an interest in it, and therefore it does not violate § 13, which forbids a transfer of the contractor's interest in the contract. (*Young Stone Co. vs. Wardens*, 61 *Barb.*, 489; see *Devlin vs. Mack*, 2 *Daly*, 94.)

The prohibition in § 13 applies only to the *lien law*, and not to other parties. (*Id.*)

As to what is sufficient assignment in such case see *Id.* and *Hoyt vs. Story*, 3 *Barb.*, 262.)

And as to assignment of *future earnings*, see *Cooper vs. Douglass*, 44 *Barb.*, 409.

133. A *general assignment* for the *benefit of creditors*, by a contractor after making a contract providing for payment after the completion of a building, does not operate to *change* the relation between the sub-contractor and the owner. The sub-contractor can perfect a lien *after* the assignment as well as before it, if such contract was not completed at the time of the assignment. (*Court of Appeals, Mandeville vs. Reed*, 13 *Abb.*, 173.)

134. If a contractor should *fraudulently assign* a *payment* due or becoming due on his contract, for the purpose of defeating

the effect of this law, such assignee should be made a party in the proceedings, and the question adjudicated upon in the same manner as a fraudulent conveyance by the owner. (See *ante*, 93 and 57.)

135. Where the contractor has assigned his interest *before* contract with sub-contractor, who had knowledge of such assignment, no lien can be acquired by the sub-contractor that will affect the assignor. (*Oates vs. Haley*, 1 *Daly*, 338.)

136. Where the *contractor* makes an assignment for the benefit of creditors, the assignee stands in the place of the contractor, and acts substantially for his benefit, and if the assignee perform the contract for him, or becomes entitled to any payments under it, the sub-contractor may acquire a lien to the same extent as if the assignment had not been made. (*Oates vs. Haley*, 1 *Daly*, 338.)

137. It was held by Judge Blatchford, in the matter of Dey (3 *Bank Reg.*, 81, and see cases there cited), "that any lien, to be "recognized by the Bankrupt Court as a valid lien on property "which passes from the bankrupt to the assignee in bankruptcy by virtue of the proceedings in bankruptcy, must be a "lien at the time of the commencement of the proceedings in "bankruptcy." That is, the lien must be perfected by the filing of the notice under the statute.

138. The *death* of the *contractor* does not prevent the validity of a lien subsequently filed. (*Telfer vs. Kierstead*, 9 *Abb.*, 418.)

139. As to how far the extent of the lien is governed by the contract see *post* "Evidence."

CHAPTER V.

THE NOTICE OF LIEN.

140. The *notice* should show such of the facts as form the basis of the claimant's lien. It should contain the name and residence of the claimant (§ 6), but need not show how he claims, whether as contractor or sub-contractor (*Lutz vs. Ey*, 3 *E. D. S.*, 621), but it is better to do so according to the fact, (*Id.*)

141. The notice need not state that the *contract* under which the work was done was made with the *owner*, (*Id.*)

142. Nor *who* made the contract. (*Hauptman vs. Catlin*, 3 *E. D. S.*, 666; *Affd.* 20 *N. Y.*, 247).

143. If the claimants are a *firm*, or *jointly interested*, each of their individual names and residences should be stated in the notice.

144. It should also state that the work, materials, &c. (it is not necessary to state the particular kind), were furnished or performed upon the premises in pursuance of or in conformity with the *terms of a contract* or employment by the owner or supposed owner, or by or in accordance with the directions of the owner or supposed owner.

145. Where an *agent* has acted for the owner, the notice should still state the same to be with the owner, or it may state the same to be the act of A B, the owner, by C D, his agent. (*Hauptman vs. Catlin*, 3 *E. D. S.*, 666. *Affd.*, 20 *N. Y.*, 247)*

146. The name of the supposed owner of the building must be stated, but no *error or variance* in the owner's name shall impair the validity of the lien. (§6, §2).

147. If the owners are a *corporation*, it should be named in the notice as owner, but if they are an unincorporated *association*,

* The following was the notice which was held sufficient in that case:

To the Clerk of the city and County of New York:

Sir: Please to take notice that I, Arthur B. Hauptman, have a claim against John M. Catlin and Catharine Ann, his wife, amounting to the sum of \$923, and that this claim is made for and on account of work, labor and materials, done and furnished towards the erection, completion and finishing of a certain four-story and basement brown-stone front house, and that such work, labor and materials were done and furnished in pursuance of a contract or agreement with the said John M. Catlin, which building is owned by Catherine Ann Catlin, and situated in the Eighteenth Ward of the city of New York (then fully described), and that I have and claim a lien on said building and the appurtenances, and upon the lots of land upon which the said building stands, pursuant to the provisions of an act of the Legislature of the State of New York, entitled "An Act for the better security of mechanics and others erecting buildings and providing material therefor in the City of New York," passed July 11th, 1851.

Dated New York, this first day of May, 1852.

(Signed)

ARTHUR B. HAUPTMAN.

the notice should describe them either by their associate or joint name, or otherwise, so that they can be identified. (*Beals vs. Cong. B. J.*, 1 *E. D. Smith*, 654.)

148. If the owners are *joint tenants*, or *tenants in common*, then each should be individually and severally described.

149. The notice must contain "a brief *description of the premises*, by street number, or diagram, or boundary, or by a reference to maps open to the public, so as to furnish information to persons examining titles." (§ 6.)

150. Under the law of 1851, it was held where a notice was addressed to the clerk of the city and county of New York, and the building was described in the notice as situated in Eighty-fifth street, between Fourth and Fifth avenues, but without stating that it was in New York city, it was held a sufficient compliance to *sustain a judgment*. (*Cunningham vs. Jones*, 3 *E. D. S.*, 650.)

151. The lien can only be on the building and premises referred to in the notice. (*McAuley vs. Mildrum*, 1 *Daly*, 396.)

152. Where a notice does not *describe* the premises upon which the work is done, no lien is acquired. (*Donnelly vs. Libby*, 1 *Sweeney*, 259.)

153. It must also state the *amount claimed*, from whom, and to whom due, or if not yet due, when it will become due. (§ 6.) If the amount of the claim is omitted, no lien is obtained. (§ 6; *Prot. U. vs. Nixon*, 1 *E. D. Smith*, 671.)

154. No *amendment* can be made to a notice after it has been filed. (*Beals vs. Cong. B. J.*, 1 *E. D. Smith*, 654; *Conklin vs. Wood*, 3 *E. D. S.*, 662; *Hallahan vs. Herbert*, 2 *Daly*, 253.)

155. The amount must be stated (§ 6,) so that the lien can be discharged by a deposit, as specified in § 10.

156. Where the notice of lien stated the amount to be due to *Muldoon*, the claimant, and the evidence showed that the claim was due to *Muldoon*, *Kenney* and *Doonan*, the notice was held defective, and that no lien was acquired. (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

157. A party cannot recover judgment for a *larger* amount than is specified in his notice, with interest thereon, and costs

of foreclosure. (*Prot. U. vs. Nixon*, 1 *E. D. Smith*, 671; *Dunning vs. Clark*, 2 *E. D. S.*, 535, and note; *Eagleson vs. Clark*, 2 *E. D. S.*, 644; *Althause vs. Warren*, 2 *E. D. S.*, 657; (*Walker vs. Paine*, 2 *do.*, 662,) although he may have judgment for a *less amount*. (*Rollin vs. Cross*, 45 *N. Y.*, 766.)

158. The party who employed the claimant, and who is legally responsible to him in an action at law, is the party who should be named as *from whom* the amount is due.

159. A very important provision in § 2 is: "that no variance as to the persons named as *contractor, owner or debtor*, "in the lien notice, or bill of particulars, or statement of claim, "or in any pleading, shall impair or affect the rights of the "claimants as herein defined, and every party shall have relief "according to the *rights* of the *parties* as they shall appear in "evidence."*

160. In regard to the *amendment* of the notice, Judge Woodruff said: "We cannot by amendment give the claimant a lien "when the act has not been complied with." (*Beals vs. Cong*, *B. J.*, 1 *E. D. S.*, 658.)

161. If any error has been made in the notice filed at the

* In the case of *Hubbel vs. Schreyer*, 14 *Abb.*, *N. S.*, 284, the court evidently overlooked this provision. The learned chief justice in his opinion (in relation to Muldoon's notice of lien, which contained a claim against Holt as debtor, and another claim against Schreyer, the owner, for other work, and the referee gave judgment for the aggregate), says in effect, that a claim stated in a notice of lien to be against the contractor, must in the foreclosure of the lien be shown to be a claim of that description, and that it will not suffice to show that it is a claim founded upon a contract made with the owner, &c. As the notice is shown to have been defective, inasmuch as a material and essential statement in it turns out to be untrue, &c., and therefore the court excluded the amount claimed in the notice against Holt, a contractor and debtor, but rendered judgment against Schreyer, the owner, for the amount claimed against him (Schreyer) in the notice.

I have made an examination of that case, and I do not think that the decision of the court rested upon that point alone, and as it has since been taken to the Court of Appeals, a decision in this case by that court, whether it reverses or affirms the decision of the court below, will not be upon that point alone, unless the question of *fact* which the referee found, (that the claimant Muldoon performed the work individually and not as a member of any firm,) which, if the court sustains the referee's said finding, the judgment of the General Term must be reversed, because the variance in the notice and the proof as to the alleged debtor is allowed by § 2.

time limited by the statute has not expired, *another notice* may be filed without regard to the erroneous notice. (*Hallaghan vs. Herbert*, 11 *Abb.*, *N. S.*, 326; *Sinclair vs. Fitch*, 3 *E. D. S.*, 677.)

162. *Several* notices may be filed (covering the same claims) under one contract. (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.) This may be necessary where the contract is payable by installments, or the delivery of materials extends over a period of more than three months. (*Spencer vs. Barnett*, 35 *N. Y.*, 94; *Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284; *Webb vs. Van Zandt*, 16 *Abb.*, 190.)

162½. A notice by a sub-contractor in which his claim is based against the *contractor* as debtor, does not estop the sub-contractor from filing another notice for the same claim against the *owner* as debtor, and *vice versa*. (*Smith vs. Ferris*, 1 *Daly*, 18; *Gridley vs. Rowland*, 1 *E. D. S.*, 670.)

163. It is not necessary, though proper, that the notice should show the *time of the performance* of the labor or of the furnishing of the material. This is a matter of defense. (*Lutz vs. Ey*, 3 *E. D. S.*, 621; *Tinker vs. Geraghty*, 1 *E. D. S.*, 687.)

164. Where the notice stated that the materials were furnished in pursuance of a written contract, it was held that *extra* materials which became necessary in consequence of defects in the specification of the written contract were covered by the notice. (*McAuley vs. Mildrum*, 1 *Daly*, 396.)

165. There is nothing in the statute that prevents claims against *different contractors* or *distinct claims* against the *owner and contractor* from being joined in the same notice, as the notice should now state the amount, from whom claimed, and to whom due. (§ 6; *Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

166. The *form* of notice set forth in *Lutz vs. Ey*, (3 *E. D. S.*, 621,) is sufficient if properly verified, as required by the present law. Perhaps it should more plainly appear from whom the amount claimed is due.

The Verification.

167. The notice must be verified by the oath or affirmation of the *claimant*. (§ 6.)

Previous to the Act of 1855 no verification was required. In

the latter year a law was passed requiring the notice before filing to be verified in the same manner that a pleading was required to be verified under the code. (*Chap. 404, § 7.*)

168. That allowed an *agent* or *attorney*, or one of a firm of partners or persons jointly interested, or an officer of a corporation, &c., to verify, and that, too, upon information and belief. (*Code, § 157.*)

The law of 1863 is explicit that the verification must be by the oath or affirmation of the *claimant*. (§ 6.)

169. Whether this is a *restriction* of the previous law, and requires a positive verification by the claimant or claimants, personally, or whether the same rule of verification applies as heretofore, has not yet been questioned. The custom is to verify as required by the law of 1855.

170. The form of the verification should be the same as was formerly required to a bill in chancery, and the same as is now used to a petition. (1 *Barb. Chan.*, 44.)

A notice filed with a defective verification *cannot* be enforced- (*Hallahan vs. Herbert*, 2 *Daly*, 253.) It cannot be amended. (*Id.*, ante, 154; *Conklin vs. Wood*, 3 *E. D. S.*, 662.) *

171. The *form* of verification prescribed by the code (§ 157) is only applicable to *pleadings* under it, and they are neither part of the rules nor of the practice. (*Allen vs. Smilie*, 1 *Abb.*, 357.) Therefore the former Chancery Rule (18) as to verification of petitions in equity is still in force (*Code, § 469; Supreme Court Rule*, 97), not having been superseded or altered.

172. When the claimant is unable to write, and he subscribes by *his mark*, the fact of the notice and affidavit having been read over to him and his understanding it should be stated in

* The verification held had in that case was as follows:

"City and County of New York, ss.:

"Albert L. Conklin, being duly sworn, says that the foregoing statement of the
"balance due from said Wood to this deponent, as set forth in the foregoing lien,
"is true according to deponent's knowledge.

"ALBERT L. CONKLIN.

"Affirmed before me, this 29th }
"day of September, 1855. }

"THOMAS A. RICHMOND,

"Commissioner of Deeds."

the verification or the jurat. (*Haynes vs. Powell*, 3 *Dowl. Prac. Cases*, 599; 1 *Barb. Ch. Prac.*, 155; 2 *do.*, 416; 1 *Abb. Forms*, 6.)

173. If the claimant is a *foreigner* not understanding our *language*, the verification or the jurat must show that the contents of the notice have been interpreted to him. (1 *Abb. Forms*, 6.)

174. Advantage of a defective verification may be taken at any time. (*Conklin vs. Wood*, 3 *E. D. S.*, 662. *Hallahan vs. Herbert*, 2 *Daly*, 253.)

175. The law does not in terms require the notice to be *subscribed* by the claimant, but it undoubtedly contemplates that it should be, as all petitions that are required to be verified are subscribed by the party making the verification. (*Hathaway vs. Scott*, 11 *Paige*, 173.) The subscription to the verification would probably be deemed a subscription to the notice, and *vice versa*.

176. In courts of chancery, bills, answers, petitions and affidavits must be subscribed by the party who verifies them. If the verification is in the form of an affidavit, the subscription must be at the end of the affidavit. (*Laimbeer vs. Allen*, 2 *Sand.*, 648.) For without such signature it would be difficult, if not impossible, to sustain a prosecution for perjury. (*Hathaway vs. Scott*, 11 *Paige*, 173.)

For sufficiency of affidavit as to form and manner of execution, see cases cited in 1 *Abb.*, *Forms*, p. 4: *

177. A *substantial compliance* with the statute as to the *form* of the notice is all that is necessary. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Beals vs. Cong. B. J.*, 1 *E. D. S.*, 654; *Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

178. All the proceedings to create a lien are intended to be as *simple* and connected with as *little detail* as possible, with a due regard for the rights and interests of the parties who may be affected thereby. (*Paine vs. Bonney*, 4 *E. D. S.*, 734.)

179. The notice, when complete, must be *filed* in the office of the clerk of the city and county of New York. (§ 6.)

* Under the Act of 1862 (§ 3) relating to the counties of Kings and Queens, it is not necessary that the notice should be verified.

186. The *county clerk* is required to *enter* in a lien docket (1) the name and residence of the claimant, (2) the person against whom claimed, (3) the amount claimed, (4) the date and hour of filing, (5) the street and particular place where located, in such manner as to be convenient in searching for the liens by streets and blocks. (§ 6.) For filing and docketing the notice he is entitled to receive ten cents.

181. It is made the express duty of the county clerk to *forthwith docket* the notice, and if he should neglect or refuse to docket the lien or do any other act the statute requires of him, he could be compelled by mandamus to do so. (*Paine vs. Bonney*, 4 E. D. S., 734.) An action would also lie against him for any damage accruing for the neglect of duty—the same as for the register neglecting or refusing to record a deed or mortgage when properly executed.

182. The statute provides that a party upon *filing* the notice shall “have a lien.” This term probably means the whole proceeding of *filing and docketing*, and, as against innocent third parties, the lien would not be valid if not docketed.

183. After the notice is filed and docketed, it is *constructive notice* of the contents thereof under the statute. (*Carman vs. McIncrow*, 13 N. Y., 70; *Kayler vs. O'Connor*, 1 E. D. S., 672.)

184. After the notice has been filed and docketed, a *payment* voluntarily made will not impair or affect the lien of any person except the one to the person so paid (§ 3), and that only to the amount of such payment. (*Schneider vs. Holbein*, 41 How., 232.)

185. Upon a notice being filed that proceedings have been *commenced*, and affidavit of service of the notice commencing the proceedings, the clerk is required to *enter that fact* in his docket, for which he is entitled to receive five cents. (§ 6.)

186. The clerk may be required to *make searches* for such notices of liens, on being furnished with a proper description of any property, and without reference to the individuals against whom the lien is filed, his fees being five cents per year for the time embraced in the search. (§ 6.)

CHAPTER VI.

CONTINUANCE AND DISCHARGE OF LIEN.

187. When the proper notice has been filed, and properly docketed by the clerk, the *lien* is then *perfected*, and thus becomes a new security given by statute.

188. The next questions that arise are: 1. How may the lien be discharged? 2. How long does it continue? 3. How, and when can it be enforced?

189. "Liens in all cases cease after the lapse of *one year* from the time of filing, *unless by order of court*, the lien is *continued*, and a *new docket* made, stating such fact without a discharge of the lien." (§ 11.)

190. The Court of Appeals (in *Freeman vs. Cram*, 3 Com., 305) held that under the general law of 1844 (*Ch.* 305), containing a similar clause about the expiration of the lien, that the lien expired at the expiration of the year from the time of filing, even though a suit may be pending for its foreclosure. Hence subsequent laws contain provisions relating to its continuance for a longer time.

191. A lien may be continued *ex-parte* by an order of a court (of record), in case no proceeding has been had on such lien. If made after proceedings commenced, it should be made by the court in which the same is pending, if in a court of record. (*Stone vs. Smith*, 3 *Daly*, 213.)

192. If after action, it may still be made on *ex-parte* application. (*Welch vs. the Mayor*, 19 *Abb.*, 132; *Porschke vs. Kedenburg*, 6 *Abb.*, N. S., 172.)

193. The application should be upon an affidavit or petition of the claimant, or other party, satisfactory to the court, showing that the lien has not expired by lapse of time, and if proceedings are pending that may affect said lien, it should state the court in which it is pending, and a copy of the notice of lien should be attached to the affidavit showing when the same was filed. A certified copy of the notice is generally used for this purpose. An order is then made and entered directing the county clerk to continue said lien by making a new docket

stating such fact. There is nothing in the statute that states how long a lien is valid after continuance. But section 11 says liens shall, in *all cases*, cease after one year.

194. The usual *ex-parte* order is that the continuance shall be for one year. And many of them are thus renewed every year for several years. In cases where proceedings are pending, orders are made continuing the lien until the determination of the proceedings.

195. Such orders would probably be valid against the parties in such case for a period longer than one year, but would not be as against *bona fide* holders without notice, only for one year from the time of the new docket.

196. The order cannot be granted, *nunc pro tunc*, to continue a lien after the lapse of one year from the filing, even if an action is pending on it. (*Porschke vs. Kedenburg*, 6 Abb., N. S., 172; *Barton vs. Herman*, 8 Abb., N. S., 399.)

197. An order continuing a lien on the anniversary of the day it was filed is good. (*Welch vs. The Mayor*, 19 Abb., 132.)

198. If the continuance is improperly granted *ex-parte*, it may be rectified on motion, (*Id.*)

199. A lien may be discharged in six different ways. (§ 10.)

200. (1.) By the certificate of the claimant, or his successor in interest, stating the lien is discharged. Such certificate should contain a sufficient reference to the notice of lien, stating time of filing, description of the property (use the same language as in the notice), the claimant's name and the amount specified in the notice, and must be acknowledged or proved in the same manner as the satisfaction of a mortgage, and be filed with the county clerk, whose duty it then is to enter the satisfaction in the lien docket.

201. If the lien is in favor of *more* than one person, any one of them can execute the satisfaction piece in behalf of all, as if a mortgage or judgment. (*Eagle and the People vs. Keyser*, 17 Abb., 214.)

202. If the lien is to be satisfied by an assignee, the assignment thereof must be in writing, and acknowledged or proved in the same manner as an assignment of judgment, and the

assignment must be filed with the certificate of satisfaction. (3 R. S., 640 ; § 24.)

203. (2.) It may be discharged as a lien on *property by depositing* the amount thereof and interest to the credit of the lien with the county clerk before proceedings to foreclose. If after proceedings have been commenced for the enforcement of the liens, then such additional amount as security for the costs thereof as a judge of the court where such action shall have been commenced, shall deem proper. (§ 10, subd. 2.) The money so deposited is held subject to the lien in place of the land and buildings. (§ 10, subd. 2, *Dunning vs. Clark*, 2 E. D. S., 535) This deposit may be by any person affected by the lien.

The effect of such deposit upon subsequent proceedings, and the manner of making it after action commenced, and of reaching it after judgment, will be hereafter stated.

204. (3.) Liens, in all cases, cease after the lapse of one year from the time of filing, unless by order of court the lien is continued, and a new docket made stating such fact, without a discharge of the lien. (§ 11 ; *Barton vs. Herman*, 8 Abb., N. S., 399 ; *Stone vs. Smith*, 3 Daly, 213 ; *Schattler vs. Gardner*, 41 How. 243 ; *Mathews vs. Daly*, 7 Abb., N. S., 379 ; *Porschke vs. Kedenburg*, 6 Abb., N. S., 172.)

205. Where an order continuing a lien after action commenced, was mislaid and lost, it was held that the lien was lost, because no new docket was made within the year, and could not be made afterwards. (*Barton vs. Herman*, 8 Abb., N. S., 399.)

206. A lien may be restored and continued after appeal in certain cases. (*McGuckin vs. Coulter*, 1 Jones and S., 328).

207. Although *no action* can be commenced to foreclose the lien *after* one year, unless the same has been continued as required by the statute (§ 11 ; *Barton vs. Herman*, 8 Abb., N. S., 399), and the same ceases to be a lien upon the land and buildings, still the lien cannot be discharged of record unless by an order to discharge the same made by any judge of a court of record upon due proof of a proceeding taken for the purpose, (§ 10, subd. 13.)

208. This is usually done *ex-parte* by an affidavit of the party

named as owner in the notice, showing that more than one year has elapsed since the filing of the notice, and that no action has been had on such lien, and that the same has not been continued, and also a certificate of the county clerk that said lien has not been continued, and no notice of any proceeding on such lien has been filed with him. (§ 10, subd. 3; *Stone vs. Smith*, 3 *Daly*, 213.)

209. In case the amount has been deposited by the contractor or sub-contractor named in the notice, the affidavit of the party so depositing the money must be obtained, similar in effect to the one above mentioned.

210. In some instances it may be impossible to obtain sufficient affidavit upon which to get the lien discharged. Due proof must then be made to the satisfaction of the judge, of the facts before mentioned as required to obtain an *ex-parte* order. (§ 10, subd. 3.)

211. A party depositing money, or his representatives, should obtain the order or judgment discharging the lien thereon, and such order or judgment should direct the county clerk to pay over the amount so deposited, less his fees, to the depositor or his representatives. (*Dunning vs. Clark*, 2 *E. D. S.*, 535, see *form*, *post*.)

212. Where proceedings have been commenced to foreclose, and the lien is not continued within the year, it ceases to be a lien, without any discharge by order of the court. (*Stone vs. Smith*, 3 *Daly*, 213; *Mathews vs. Daly*, 7 *Abb.*, *N. Y.*, 379; *Barton vs. Herman*, 8 *Abb.*, *N. S.*, 399; *Schattler vs. Gardiner*, 41 *How.*, 243.)

213. A lien cannot be discharged on *motion* on the *merits*, while an action is pending to foreclose it. (*Fettrich vs. Totten*, 2 *Abb.*, *N. S.*, 264; *McGuckin vs. Coulter*, 10 *Abb.*, *N. S.*, 128.)

214. While an action is still pending to foreclose a lien, the court cannot by an order on motion continue or discharge the lien after the expiration of one year. (*Stone vs. Smith*, 3 *Daly*, 213.)

215. (4.) By a judgment or docket of a judgment exempting such property after ten days on proof of notice of such judgment, and that ten days have elapsed and no appeal has been

taken therefrom (§ 10.) The court generally requires notice of application under this subdivision. Under such a judgment the lien may be discharged of record, notwithstanding an appeal, unless the proceedings have been stayed, as required by section 8 (*Van Cleve vs. Abbott*, 3 *Abb.*, *N. S.*, 144). This should be on notice to the parties interested, and an affidavit showing the facts entitling the party to the order (*Id.*), and should be made in the court where the judgment was recovered.

216. A judgment against the claimant, even though it be but a judgment of nonsuit, will entitle the owner to have the lien discharged. (*Sullivan vs. Brewster*, 1 *E. D. S.*, 681.)

217. If the judgment should be afterwards reversed, the lien would be restored, provided the property had not passed into the hands of *bona fide* purchasers without notice of the appeal, as in cases of the lien of other judgments. (*McGuckin vs. Coulter*, 1 *Jones & Spencer*, 328.)

218. The same rule prevails as to any error in the filing or docket of the notice, or continuance of it. (*Barton vs. Herman*, *Abb.*, *N. S.*, 399). If a lien is discharged erroneously on motion, such discharge may be vacated on motion (*Butler vs. Magie*, 2 *E. D. S.*, 654.)

219. (5.) By an entry by order of the court that the judgment has been secured on appeal. (§ 10, subd. 5, § 8.)

220. (6.) The lien will be discharged by the satisfaction of the judgment recovered in an action brought to foreclose the lien. (§ 10, subd. 6.) The return of the execution wholly satisfied is sufficient to authorize the clerk to enter the same as satisfied in the docket, in the same manner as is done in other cases. (3 *R. S.*, 641, § 26, *Laws* 1860, *Ch.* 13, § 6). A satisfaction of judgment executed as in other cases, would also authorize the clerk to discharge the judgment.

221. A party desiring the lien to be satisfied of record, must offer the instrument to be executed to the lienor, and offer to pay the expenses of its execution. That is the law in regard to a judgment. (*Pettingill vs. Mather*, 16 *Abb.*, 399; *Briggs vs. Thompson*, 20 *John*, 294; 3 *R. S.*, 641, § 25.)

PART III.

FORECLOSURE OF LIENS.

CHAPTER I.

JURISDICTION OF COURTS.

222. Section four provides that "where the aggregate of liens shall be less than five hundred dollars, the said proceedings may be had before *any court* in the said city; and where they exceed that sum, when the proceedings *are commenced*, the action shall be conducted in a court of record having *equity jurisdiction*, and none of the courts in the said city shall be deprived of jurisdiction by reason of the residence of any parties elsewhere."*

223. Under the act of 1851 no court of record had jurisdiction except the Court of Common Pleas, and the Marine and District Courts in certain cases. (§ 4.)

224. The statute of 1863 is plain as to courts of record, but as to the Marine and District Courts, many questions can arise. The only limitation in the jurisdiction of these courts seems to be in the amount of the aggregate of liens. Yet it seems unreasonable (1) that the notice for the commencement

* Under the act of 1862, relating to the counties of Kings and Queens, only a court of record in said counties has jurisdiction to foreclose liens. (§ 2).

of the proceedings in these courts could be served in any part of the State, and (2) when a party is out of the State, that he could be served by publication, (3) when one lien amounts to more than \$250, the District Court would still have jurisdiction, provided the aggregate was not over \$500, (4) when the title to real property is involved, that question could be there tried, (5) and a fraudulent conveyance could be set aside as in a court of record, (6) and that a judgment directing the sale of the owner's interest could be executed by a marshal of said courts, (7) and, therefore, distribute the surplus as in cases of foreclosure of mortgages?

225. If the proceedings were intended to be the same in every particular specified in the act, how long a time would the notice of publication have to be made, in what papers and under what authority, and how would the advertisement of sale of real property have to be made?

(The question of enforcing judgment will be hereafter discussed under judgment and execution.)

226. Some of these questions were directly answered under the law of 1851, in (*Quimby vs. Sloan*, 2 E. D. S., 594), in regard to the Marine Court,—“That court has no jurisdiction to “enforce *equitable liens*.” It has no equitable jurisdiction except “such as this very statute confers upon it. Actions to recover “or enforce claims to real property, or a right or title or interest “therein, legal or equitable, must be brought in other courts. “The statute in question has given the Marine Court jurisdiction in specific cases under that statute, and we have held “and are still of opinion that this clothed that court with all “the jurisdiction necessary to carry the provisions of this “statute into full effect, and in a foreclosure of the lien given “by the statute, to order the premises to be applied to the “satisfaction of the lien.”*

227. Chapter 629 of the Laws of 1872 extends the jurisdic-

* After a judgment has been recovered in the Marine or District Courts, and a sale thereon on execution, of all the right, title and interest in the property of the party against whom the judgment was recovered, an action of ejectment may be maintained against the grantee, and thus contest the *bona fides* and validity of any transfer made to defraud the lienor (*Ernst vs. Reed*, 49 Barb., 367; *Randolph vs. Garvey*, 10 Abb., 179).

tion of the Marine Court in proceedings to foreclose mechanics' liens, where the amount of money, damages and recovery claimed, exclusive of interest, costs and allowances, do not exceed \$1,000 (§ 3, sub. 10); but whether this applies to the aggregate amount of all the liens, or to any amount, provided no one of them exceeds \$1,000, has not been settled by a judicial decision, but it must be taken as extending § 4 of the lien law, in which it is provided that, "where the aggregate of *liens* shall be less than \$500, the said proceedings may be had before any court in the said city, and when they exceed that sum, when the proceedings are commenced, the action shall be conducted in a court of record having *equity jurisdiction*," &c.

228. Although the Marine Court has no jurisdiction when the aggregate of liens exceeds \$1,000, it has jurisdiction in these proceedings, to whatever sum the accounts between the parties may amount. It is the same with the District Courts, the *aggregate of liens* is the only limitation as to the jurisdiction of the matters in dispute. (*Foley vs. Gough*, 4 E. D. S., 724.)

229. The only reasonable construction to be put upon the questions as to the Marine and District Courts then is, that the notice for the commencement of the proceeding is to be regarded as a summons, (*Lowber vs. Childs*, 2 E. D. S., 577; *Quimby vs. Sloan*, 2 E. D. S., 595; *Maltby vs. Green*, 1 Keyes, 548; *Reynolds vs. Hamil*, 1 Code R., N. S., 230). *The People ex rel. Bendon vs. Co. Judge of R. Co.*, 13 How., 398,) issued out of those courts, but signed by the claimant and served in the same manner as a summons, but at least ten days before the return thereof (§ 5), and that no recovery can be had by any party for any amount or upon any question beyond the jurisdiction of these courts in other actions on simple contract.

(The manner of proceeding and the enforcement of the judgments of these courts will be hereafter considered.)

230. In regard to the *removal* of these proceedings from the District Court to the Court of Common Pleas for trial, section 3 of the District Court Act of 1857 does not apply, because these are special proceedings, and express jurisdiction therein is conferred upon the District Courts, and the act of 1857 expressly provides that any action commenced pursuant to this section (§ 3) may be removed, &c.

As to jurisdiction in appeals, see appeal, *post*.

231. So many questions can arise in the proceedings in the Marine and District Courts as to the manner of service and the enforcing of judgments, it is well to take into consideration that courts of record have concurrent jurisdiction (§ 4) in these cases, without regard to the amount, although the amount claimed is less than \$50, without the claimant being liable for costs if his recovery is under \$50. (see costs, *post*.)

232. Chancellor Walworth, in the case of *Brown vs. Brown*, (1 Barb. Chan. R., 217) in the Court of Chancery, said: "Where no remedy exists elsewhere to enforce a right, this court will furnish such a remedy whenever it is necessary to prevent a total failure of justice." The equity case of (*Scarsfield vs. Vaugner*, 15 Abb., 65), in the Supreme Court, was for a claim under \$50.

233. As to jurisdiction of the Supreme Court in equity cases, without regard to the amount in dispute see *Laws* 1862, p. 859, § 39; *Laws of* 1863, p. 664, § 2; *Boorman vs. Johnson*, 26 How., 27; *Scarsfield vs. Vaugner*, 15 Abb., 65; *Marsh vs. Benson*, 34 N. Y., 358.

234. A judgment of a court of record for any amount, however small, is a lien upon real estate and the same may be sold upon execution in such judgment (3 R. S., p. 637, § 4); but a judgment of a Justice's Court for an amount under \$25 can only be enforced against personal property. (3 R. S., p. 446, § 120, Code, § 68, see "Judgment" and "Execution," *post*.)

CHAPTER II.

TIME AND MANNER OF COMMENCING FORECLOSURE.

235. As the owner is bound to take notice of the lien from the time of filing (§ 3, and *ante*, 183), the proceeding may be commenced to foreclose without making any previous demand on him or on any other party to the proceeding.

236. Where there are liens filed, the owner cannot commence an equity action in the *ordinary way*, asking that the liens be canceled. (*Spratt vs. Nicholson*, 3 Daly, 182.) He can only

proceed under this statute. (*Id.*, *Fettrich vs. Totten*, 2 *Abb.*, *N. S.*, 264; *Carroll vs. Caughlin*, 7 *Abb.*, *N. S.*, 72.) *

237. The proceedings to enforce or foreclose a lien may, after the expiration of ten days after the filing thereof, at any time during the continuance of it, as a lien (*Mushlitt vs. Silverman*, 50 *N. Y.*, 360; *Carroll vs. Caughlin*, 7 *Abb.*, *N. S.*, 72), be instituted by any person or persons so filing it, or by *any* owner or *other* person interested in the matter. (§ 4.)

238. Any *contractor* may, therefore, commence where liens are filed against his claims. (*See post*, 262.)

239. Proceedings must be commenced before the lien ceases. (*Maltby vs. Green*, 1 *Keyes*, 548; *Barton vs. Herman*, 8 *Abb.*, *N. S.*, 399.)

240. In any case, however, the lien cannot be foreclosed by the claimant until the debt is due him. (*Althause vs. Warren*, 2 *E. D. Smith*, 657; *Teaz vs. Chrystie*, 2 *do.*, 621.)

241. But can the owner or other person foreclose before that time? In *Miller vs. Moore* (1 *E. D. Smith*, 739) the court intimated that by the owner commencing the proceedings he waived the term of the credit, and by his own act was estopped from setting up that as a defense. In the same case, at General Term, the same view was sustained. (*Id.*, 747.)

242. The process provided by the act (§ 4 and 5) for commencing the proceeding is much more intricate than the ordinary summons, though it answers but the same purpose and is a substitute for it. (*Ante*, 229; *Maltby vs. Green*, 1 *Keyes*, 548; *Reynolds vs. Hamil*, 1 *Code R.*, *N. S.*, 230; *Brown vs. Wood*, 2 *Hilton*, 579; *Sullivan vs. Decker*, 1 *E. D. S.*, 699; *Lowber vs. Childs*, 2 *E. D. S.*, 577; *Jackson vs. Sloan*, *do.*, 617; *People, ex rel. Bendon, vs. Co. Judge of R. Co.*, 13 *How.*, 398; and *Schaetler vs. Gardiner*, 41 *How.*, 243. *Do.* 47 *N. Y.*, 404.†)

* It is a well recognized *principle* that when a statute creates a right, and also prescribes a remedy and mode of enforcement, that mode is exclusive. (*Shaw vs. Meldrum*, 14 *Abb.*, *N. S.*, 165; *Dudley vs. Mayhew*, 3 *N. Y.*, 9.)

† A question arose under the law in Rens. Co., whether proceedings to foreclose a lien under the statute should be regarded as a special proceeding, and therefore a review of a decision therein should be by *certiorari*, or by an appeal from the judgment, as in an ordinary action, and under the code. The General Term of the Supreme Court held that the proceedings to review a judgment under these statutes should be regarded as in an ordinary action. (*The People ex rel. Bendon, vs. Co. Judge of Rensselaer Co.*, 13 *How.*, 398.)

243. The statute only requires that the notice shall contain (1) the names of the parties, (2) stating the liens and the times of filing, (3) requiring them to appear in court at a day and hour named. (§§ 4 and 5.) (See *Lowber vs. Childs*, 2 E. D. S., 577.)

244. The notice in use contains: (1) An entitling of the case, giving the name of the court and the names of the parties. The person commencing the proceeding is named as plaintiff, and all the other parties as defendants. (2) Stating how the plaintiff is interested, either as owner, contractor, debtor, lienor, incumbrancer or assignee of lienor. (3) A reference to the liens, stating the times and place of filing. If the liens have been continued by order, the notice should show when. (4) Their respective amounts. Stating the amounts would seem to be necessary in order to show that the court had jurisdiction, particularly the amount, if in the Marine or District Courts. (§ 4.) In *McSorly vs. Hogan* (1 Code R., N. S., 285), it was held that the notice "should apprise the owner of the fact of the lien, stating the amount of it, and when it was docketed." In *Tinker vs. Geraghty* (1 E. D. Smith, 687), it was held that the notice "should contain a sufficient reference to the alleged lien," but need not show when the materials were furnished. (5) A brief description of the premises. In the case of *Tinker vs. Geraghty*, it was questioned if it be at all necessary to describe the building otherwise than by a reference to the creation of the lien. (6) Stating the name of the contractor (debtor) of the claimants. The omission of the contractor's name (the party from whom the amount is claimed) may be a fatal defect in the notice to foreclose, but such variance is not fatal to the lien. (§ 2; see *McBride vs. Crawford*, 1 E. D. S., 658.) (7) A requirement to appear in a specified court (if a court of record, at a Special Term at Chambers) and at a specified day and hour. A notice to appear before the clerk of the court is not good. (*Dressel vs. French*, 7 How., 350.) (8) The object of such appearance, to wit, "to submit to an accounting and enforcement of the amounts due or claimed to be due on said liens, pursuant to the act in such case made and provided." (9) This notice, in whatever court it is returnable, should be subscribed by the party giving it, to wit, A—— B—— (lienor or other

party) by C—— D——, his attorney, 111 Broadway, N. Y.
(10) Should be addressed to the parties named as defendants.

245. Said notice may be served at any time after the notice of lien has been filed ten days (§ 4), provided the lien has not ceased by lapse of time (*Carroll vs. Caughlin*, 7 Abb., N. S., 72), and must be served upon all persons who have filed liens, and upon the owner and incumbrancers *when they can be found*. (§ 5.) If the lienors cannot be served personally, they may be served by leaving the notice at the place designated by them in their notice of lien. (§ 5.)

246. In case a defendant is a resident of this State and cannot be found, or, if found, avoids or evades the service so that the same cannot be made personally, the notice could be served under *Laws* of 1853, *ch.* 511.

247. When any of the parties defendant do not reside within this State or have removed therefrom, the service may be by publication as to them. (§ 4.)

248. No proceedings are prescribed as to the mode of such service, or how long the publication must be. The only rule, then, that can be reasonably adopted would seem to be the same as is prescribed by the Code for the service of a summons by publication. Service by publication would be deemed to be complete on the day of the last publication of the notice, as in case of a summons (*Code*, § 137), and the time of the appearance in court must be at least ten days after that.

249. This rule, it would seem, was not intended to apply to the service of the notice when the proceeding is commenced in the Marine or District Courts; and in these courts the service of notice should perhaps be personal, except as to the persons who have filed liens and designated places where they may be served. And in cases where the owner or incumbrancers are necessary parties, the said courts could acquire jurisdiction over them only by personal service.

250. Whether this service could be made out of the city of New York, or out of the ordinary jurisdiction of these courts, would seem doubtful, if not improbable. Yet § 4 provides that "none of the courts in the said city shall be deprived of jurisdiction by reason of the residence of any parties elsewhere."

251. In case of an erroneous notice, the court should follow the same rules as to amendments as in ordinary summons.

252. In *Beals vs. Cong, B. J.* (1 *E. D. Smith*, 654), the Court said that if the defect was "a merely formal error in the notice "by which the proceedings to foreclose was instituted, that "defect might be deemed waived by a general appearance;" and in *McBride vs. Crawford* (1 *Id.*, 658) the Court held that entering upon the subject matter of his defence the defendant had waived any defect in the form of notice.

253. If the notice is dismissed for irregularity, another notice may be given. (*McSorley vs. Hogan*, 1 Code, R. N. S., 285.)

254. The person that may make the service is not designated. It may be by the sheriff, or any person of suitable age. The better plan is to follow precisely the rule required in the service of summons, and the proof thereof by affidavit, as is specified by rule 23 of the Supreme Court.

255. Where a proceeding has been commenced by one lienor to enforce the liens, another lienor who is a defendant therein, cannot commence another distinct proceeding to foreclose his lien. The latter proceedings will be dismissed on motion. (*Graff vs. Rozenberg*, 6 *Abb.*, N. S., 428.)

256. Upon a notice to the clerk that proceedings have been commenced, he is required to enter that fact in his docket. (§6.)

The form of the notice that proceedings are commenced, to be given to the clerk, is a copy of the notice by which the proceedings were commenced, and affidavit of the service of the same on the defendants against whom it is to operate, and that the proceeding is still pending.

If a defendant wishes to give the clerk notice, he must serve on the clerk a copy of said notice, with an affidavit that the same has been served on him, and that the proceeding is still pending. (See *Paine vs. Bonney*, 4 *E. D. S.*, 734.)

257. A question may arise, where there are mortgages on the property, whether the mortgagee, if he wishes to foreclose his mortgage, should proceed by action in the ordinary way, making the lienors parties defendants, or should proceed by the

notice required by §4, under the act of 1863. The statute says, "any person interested may commence such proceeding." (§4.)

258. A mortgagee can undoubtedly commence the proceeding, but he is not restricted to that form, but may proceed to action as formerly, in which the rights of lienors and owner and others may be determined. A prior mortgage was foreclosed by action in the case of *Livingston vs. Miller* (16 *Abb.*, 371,) and the rights of the lienors to the surplus fund were determined. (*Id.* See *Noyes vs. Burton*, 17 *How.*, 449. *Schafer vs. Reilly*, 50 *N. Y.*, 61. *Livingston vs. Mildrum*, 19 *N. Y.*, 440. *Stuyvesant vs. Browning*, 1 *Jones & S.*, 203.)

259. If a mortgage is foreclosed without making a lienor a party, he may afterwards take proceedings and foreclose his lien. (*Hallahan vs. Herbert*, 11 *Abbott, N. S.*, 326. See *post*, 290.)

260. An ordinary action in equity or at law may, under certain circumstances, be prosecuted to decide questions that may arise under this act. (See *Westervelt vs. Levy*, 2 *Duer.*, 354. *Paine vs. Bonney*, 4 *E. D. S.*, 734. *Belmont vs. Smith*, 1 *Duer*, 675. *Randolph vs. Garvey*, 10 *Abb.*, 179. *Ernst vs. Reed*, 49 *Barb.*, 368, and *ante*, 258. *Young Stone D. Co., vs. Wardens, &c.*, 61 *Barb.*, 489.)

271. When the lien is perfected by complying with the statute, the lien is still valid after a petition in bankruptcy, and the State Court may still proceed to a certain extent. (*In re. Clifton*, 3 *Nat. Bk. Reg.*, 162. *Gray, J., Mass.* See § 21 *Bankrupt Act.*)

262. If the owner is afterwards in bankruptcy, the lien may be proved the same as any other lien under § 20 of the Bankrupt Act.

263. Where liens against real estate by a statute law have been perfected before voluntary petition filed in bankruptcy, such liens are within the saving clauses of §§ 14 & 20 of the Bankrupt Act. (1 *Nat. Bk. Reg.*, 169, 165, 154-157. 2 *Id.*, 33.)

CHAPTER III.

PARTIES TO THE PROCEEDINGS.

264. The proceedings to enforce or foreclose a lien may, after the expiration of ten days after the filing thereof, during its continuance as a lien, be instituted by any person or persons so filing it, or by *any owner or other* person interested in the matter (§ 4, and *ante*, 237).*

265. Those who commence should be named as plaintiffs who are jointly interested either as copartners, joint tenants or tenants in common, either as lienors, assignees of liens, owners, contractors, or incumbrancers.

266. Although, as we have seen, an assignee of a claim cannot file the notice, after a notice has been filed an assignee could, under this provision, take proceedings to foreclose it, the same as an assignee of any other chose in action. (*Hallahan vs. Herbert*, 11 *Abb., N. S.*, 326.) See Code, § 111, § 112 and notes.

Subdivision 1 of § 10 contemplates a subsequent assignment after notice filed. (*Roberts vs. Fowler*, 3 *E. D. S.*, 632.)

267. In such proceedings each and every person or persons who have filed liens shall be parties to and have notice of such proceedings (§ 4.) See *post*, 287.

268. When the proceeding is instituted by a *lienor*, all persons who have filed notices of liens on the property, as well as the owner, mortgagee, judgment creditor, subsequent grantee and other subsequent incumbrancers of the property, should be made parties defendant (§ 5).† See *post*, 287.

269. If a lien has expired by lapse of time, but not discharged by order of the Court or otherwise, the lienor should be made a party, in order to have mistakes, if any, corrected, if equitable.

* Previous to the Act of 1863 a contractor could not, under the statute, summon or compel a *sub-contractor* to appear and account. (*Carpenter vs. Jaques*, 2 *E. D. S.*, 571; *Butler vs. Magie*, *do.* 654.)

† Under the law of 1851 and '55, it was not necessary to make subsequent lienors parties. (*Kaylor vs. O'Connor*, 1 *E. D. S.*, 672. *Westervelt vs. Levy*, 2 *Duer*, 354;) nor to make *any incumbrancers* parties, the proceeding might be between the owner and the lienor only, even if he was a *sub-contractor*. (*Kaylor vs. O'Connor*, 1 *E. D. S.*, 672. *Foster vs. Skidmore*, *do.*, 719.) The law of 1862 relating to the counties of Kings and Queens is the same as the law of 1851-55 on that point.

270. The *contracting owner* must be made a party, even if he has conveyed the property after the lien was filed. (*Althause vs. Warren*, 2 *E. D. S.*, 657), because, if his property was liable by his acts, he is still liable, and this is so even if he is not named in the notice of lien (§ 2.)

271. A prior mortgagee, whose mortgage is not yet due, should not be made a party. (2 *Barb. Ch. Prac.*, 174. *Case vs. Price*, 9 *Abb.*, 111.)

272. If the prior incumbrances are due, the plaintiff may make them parties for the purpose of having the amount of the incumbrances liquidated and paid out of the proceeds of the sale, or he may have the property sold subject to such prior incumbrances, the same as in mortgage cases. (*Holcomb vs. Holcomb*; 2 *Barb.*, 20; *Mathews vs. Aikin*, 1, *N. Y.*, 595; *Kaylor vs. O'Connor*, 1, *E. D. S.*, 672; *Sullivan vs. Decker*, *do.*, 699; *Chamberlain vs. O'Connor*, 1 *E. D. S.*, 665. *Rule 72.*)

273. Any party interested may apply to the Court to have prior incumbrancers made parties. (*Code*, § 122; *Kaylor vs. O'Connor*, 1 *E. D. S.*, 672; *Chamberlain vs. O'Connor*, *do.*, 665; *Sullivan vs. Decker*, *do.*, 699; *post*, 278.)

274. Where a fraudulent grantee is a party to the foreclosure, his claim may be tried and adjudicated upon, and judgment given against him. (*Quimby vs. Sloan*, 2 *E. D. S.*, 594; *Bailey vs. Johnson*, 1 *Daly*, 61; *Meehan vs. Williams*, 36, *How.*, 73.)

On the same principle, a fraudulent assignee of the amount due under the contract may be made a party, and his rights adjudicated upon.

275. In these proceedings the equity rule applies that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved. (*Code*, § 122, *Lowber vs. Childs*, 2, *E. D. S.*, 577; *Kaylor vs. O'Connor*, 1 *E. D. S.*, 672.)

276. The contractor is not in terms required to be made a party when the plaintiff is a sub-contractor or an employee, or vendor of the contractor (*Sullivan vs. Decker*, 1 *E. D. S.*, 699); but any claimant may, by making both his contractor and the owner parties, obtain a personal judgment against the con-

tractor, though failing as against the owner. (§ 9, *Grogan vs. The Mayor*, 2 *E. D. S.*, 693; *Sullivan vs. Brewster*, *do.*, 689; *Grogan vs. McMahon* 4, *do.* 754; *Schaettler vs. Gardiner*, 41 *How.*, 243, *do.* 47 *N. Y.*, 404; *Barton vs. Hermann*, 8 *Abb.*, *N. S.*, 399.)

277. A party cannot demur to a complaint because a contractor is not made a party. (*Foster vs. Skidmore*, 1 *E. D. S.*, 719.)

278. It is the duty of the Court, when a complete determination cannot be had without the presence of other parties, to cause them to be brought in. (*Davis vs. The Mayor*, 2 *Duer* 663; *Turnell vs. Hall*, 3 *Abb.*, 205; *Waring vs. Waring*, *do.*, 246; *Code*, § 122; *Sullivan vs. Decker*, 1 *E. D. S.*, 699; *Lowber vs. Childs*, 2 *do.*, 577.)

279. It is advisable to have the contractor before the Court if possible, in most instances, in order to do equity and justice to the claims of the respective parties. (*Lowber vs. Childs*, 2 *E. D. Smith*, 577; *Sullivan vs. Decker*, 1 *do.*, 699; *Kaylor vs. O'Connor*, 1 *do.*, 672; *Foster vs. Skidmore*, 1 *do.*, 719. *Chamberlain vs. O'Connor*, *do.* 665.)

280. When in the proceeding it appears that a claimant was engaged by a sub-contractor, in such case it may be necessary and proper to have both the contractor and sub-contractor parties, although no claim is made by either of them.

281. The owner can also have the contractor brought in as a party. (*Sullivan vs. Decker*, 1 *E. D. S.*, 699; *Foster vs. Skidmore*, *do.*, 719; *Lowber vs. Childs*, 2 *do.*, 577; *Kaylor vs. O'Connor*, 1 *E. D. S.*, 672.)

282. Where the owner has paid his contractor, and that is the only question at issue, it may not be necessary that the contractor should be brought in when the proceeding is by or against a person engaged by the contractor or other party, (*McBride vs. Crawford*, 1 *E. D. S.*, 658); but the contractor may be allowed to come in on his own motion.

283. When the proceeding is commenced by the owner he need only include those who have filed liens. If the lienors wish any other persons to be made parties, they can apply for an order to bring them in. (*Ante*, 287.)

284. Where the money has been deposited, and the lien on the property discharged under sub. 2 of § 10, the only necessary parties in the proceedings are those who are directly interested in that particular fund, as in cases of surplus funds on foreclosure of mortgage. (*Hubbell vs. Schreyer*, 14 *Abb.*, N. S., 284.) Thus when the deposit is made by an employee of a sub-contractor who has deposited the money before proceedings commenced, the sub-contractor is the only necessary party defendant to the proceedings by the claimant. If the owner and contractor are made parties after such deposit by the sub-contractor, an order will be made on application, striking out their names and without costs. (*Schaettler vs. Gardiner*, 41 *How.*, 243.)

285. In case there are several sub-contractors, and liens are filed by some of the employees of one or more, and money is deposited by some or all of the sub-contractors, still a claimant may proceed against his contractor (the sub-contractor), who has made a deposit without making the owner or any of the other claimants parties, unless their claim is upon that particular fund. (*Id.*) •

286. After proceedings have been commenced, and the contractor deposited the amount and costs, under § 10, sub. 2, the proceedings against the owner should be dismissed unless he is claimed to be personally liable. (*Schaettler vs. Gardiner*, 41 *How.*, 243.)

287. The statute requirement that all lien holders shall be made parties (§ 4 & § 5) is permissive merely, and at most can only apply to be necessary to all of those filed under the *same contract*, and those filed subsequent to those that are to be foreclosed. Prior lienors, under different contracts, may not have any interest in the proceedings, because if they are not parties the amount of their claims must be credited to the owner and the property sold subject to them. (*Kaylor vs. O'Connor*, 1 *E. D. S.*, 672; *Chamberlain vs. O'Connor*, *do.*, 665.)

288. The wife of the owner is not a necessary party, as she cannot be barred of dower by the proceeding unless she is a party to the contract.

289. The wife of a subsequent grantee, after notice filed,

should be made a party defendant, in order to bar her right of dower, as in mortgage cases. (1 *Crary's Prac.*, 280.)

290. The general rules that govern the naming of parties who have future and contingent interests and claims in the equity of redemption, or as owners, is the same as in mortgage cases. (*See Story's Eq. Pl.*, §§ 182 to 203.)*

As to who may be regarded as owner see *Ante*, chap. 4.

291. Making an improper person a party as *owner* or *contractor*, or *debtor*, does not affect or impair the validity of the *lien* (§ 2-§6.) But the parties seeking to charge any of these may be liable for costs to them, as in other actions. (*Jackson vs. Sloan*, 2 *E. D. S.*, 616; *Knapp vs. Brown*, 45 *N. Y.*, 207.)

292. In proceedings by or against *minors*, *trustees*, and persons under any *disability*, the same rule and proceedings apply as in an *ordinary action* under the Code.

293. If there be a defect of parties, an application to add them may be made in the appearance of the parties pursuant to notice, or at any stage of the proceedings (*Sullivan vs. Decker*, 1 *E. D. S.*, 699) where an order is set forth in full. (*Foster vs. Skidmore*, 1 *E. D. S.*, 719; *Lowber vs. Childs*, 2 *E. D. S.*, 577; *State of New York vs. the Mayor*, 3 *Duer*, 121; *Code*, § 122, and notes.)

294. It must be before judgment. (*Casswell vs. Neville*, 12 *How.* 445; *Hubbard vs. Evans*, 22 *Barb.*, 597.)

295. Proceedings to bring in parties or to be made a party, may be founded upon petition or upon affidavit. (*Sullivan vs. Decker*, 1 *E. D. S.*, 699; *Foster vs. Skidmore*, 1 *E. D. S.*, 719; 2 *Abb.*, forms 220, note.)

296. When liens are filed after service of notice, and before final judgment, the lienors shall be required to appear summarily at such time as the court or a judge thereof shall order

* Since the repeal of the law of 1840 (ch. 342, § 9,) by the law of 1844 (ch. 346 § 5,) it is necessary to make *all subsequent incumbrancers* parties on foreclosure of mortgage or they are not bound by the decree, and may bring an action for an accounting and leave to redeem, and the purchaser be regarded as a mortgagee in possession, and must therefore account for the rents and profits. (*Brainard vs. Cooper*, 10 *N. Y.*, 356; *Walsh vs. Rutger's Fire Ins. Co.*, 13 *Abb.*, 33,) and the amount of his claim by the mortgage litigated therein (*ante*, 272.)

(§ 5,) and shall be notified to appear and join in the said proceedings by a notice to be served at least five days before the entry of judgment. (§ 4.)

297. Persons who become subsequent incumbrancers other than lienors under this statute, after proceedings commenced are not necessary parties. (*Suydam vs. Holden*, 11 Abb., N. S., 329.)

398. In regard to the manner of bringing in parties, Woodruff says; "Upon this subject there can be no difficulty in following in substance the former equity practice. An order being made to add the contractors as parties, they can be summoned to answer the plaintiff's complaint with the other defendant already in court, and on being served with the order, summons and complaint, they would be clearly bound to do so, or they could never after complain of any judgment which might be rendered between the claimant and the owner." (*Sullivan vs. Decker*, 1 E. D. S., 699; *Foster vs. Skidmore*, 1 E. D. S., 719.)

399. It is the duty of the plaintiff's attorney to make examination of the record, and if any liens have been filed since the proceeding, he must obtain a summons from the court, and serve the same and the notice and complaint, although it may be obtained and served by any party to the proceeding.

400. The summons may be obtained *ex-parte*, on affidavit showing the state of the case, and the fact that the lien has been filed since the proceeding was commenced.

401. The summons and notice requiring the lienor to appear may be as short as the court may direct. (§ 5.) But a lienor has at least five days after the service of the notice in which to prove his claims before the entry of judgment. (§ 4.)

402. The Marine Court and District Courts have the same power to require the contractor to be brought in as a party as a court of record. (*Lowber vs. Childs*, 2 E. D. S., 577.)

403. The penalty of making improper parties, and seeking to charge their interest, is to make the plaintiff liable for costs as in other actions. (*Jackson vs. Sloan* 2 E. D. S., 616.)

404. But it does not impair the validity of the lien or the proceedings upon it (§ 2) as to the proper parties.

CHAPTER IV.

PLEADINGS AND CLAIMS.

405. The statute (§ 5) is very ambiguous as to the time and manner of joining in the issues to be proved and tried. Formerly the pleadings were the same in form as in ordinary actions under the Code. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Brien vs. Clay*, 1 *E. D. S.*, 649; *Jaques vs. Morris*, 2 *E. D. S.*, 639; *Duffy vs. McManus*, 3 *E. D. S.*, 657; *Bailey vs. Johnson*, 1 *Daly*, 61.)

406. It is to be observed that no form of pleading is required by the statute, yet § 7 mentions that in cases where the parties appear and plead, &c., thus contemplating pleadings, and § 5 provides that the court shall proceed without regard to *matters of form*, which shall be amendable at all times while the proceedings progress. In an early case under the former law (*Empire Dressing Co. vs. Pickering*, *Nott's Lien Law*, p. 44) the court said that inasmuch as the pleadings in lien cases are required by the court and not by statute, the court will look upon them with greater leniency than upon ordinary pleadings and will exercise with respect to amendments a more liberal discretion. Section five of the act is only carrying out that suggestion.

407. The issues mentioned in § 5 are not confined to issues of fact, that mentions "statement of claims," and "objections to such claims," &c. Demurrers are objections and make issues, (*Doughty vs. Devlin*, 1 *E. D. S.*, 625.)

408. And now the "statement" referred to may take the form of an ordinary complaint or answer, and the "objections" may be an answer, a counter-claim, a reply, a demurrer and motions.

Judge Woodruff said: "The issues joined may be upon the claims made, or upon the set-off, or upon both. They may be issues of law or issues of fact. Nothing in the act confines the issues to *facts* only, and if not, then the pleadings may be so framed as to present *any issues* which the parties may desire to raise respecting the matters in controversy. To my mind it is plain that the Legislature intended, after pointing out

“the mode in which a lien might be secured, and an appearance in court compelled, to provide that, on such appearance, the proceedings should in all respects assume the form of an ordinary civil action, and in all things *after the appearance*, be governed by the same rules as other civil actions brought for the enforcement of *similar rights*.” (*Doughty vs. Devlin*, 1 E. D. S., 625.)

409. The practice now is to proceed in the manner and form as under the previous statutes. (*Sullivan vs. Decker*, 1 E. D. S., 699; *Reynolds vs. Hamil*, 1 Code R. N. S., 230; *Dressel vs. French*, 7 How., 350; *Schaettler vs. Gardiner*, 41 How., 243; *Schaettler vs. Gardiner*, 47 N. Y., 404.) At the time and place specified in the notice, the party serving the same appears, and after all objections to the form of the notice, and the manner of service are disposed of, an order is entered requiring the party who commences the proceeding as plaintiff, to file and serve a complaint on the parties who have appeared, as in an ordinary action, within ten or twenty days, and that the defendants or any party affected thereby, in like manner may serve a copy of their answer (objections), or demurrer thereto within twenty days after the service of the copy complaint, and that such other pleadings may be served between the parties as may be necessary in the action according to the usual course in other actions, and each party must also, if demanded, serve within ten days upon the attorneys demanding it, a statement of the claim and bill of particulars represented by him, and that thereafter the action proceed as in an ordinary action. (*Id.*) This order may be entered by consent, the same as any other order. A copy of it must be served upon the attorneys for the respective parties who have appeared.

410. When the proceeding is commenced by the owner on the return of the notice, the order for issue directs that each of the claimants file a statement of his claim, and a bill of particulars and serve a copy thereof on the owner's attorney within ten days, and on any other party who may be affected thereby, and that he may serve his answer or objections thereto within five days thereafter, and that in default of any of said claimants serving their claims as aforesaid, that an order be entered discharging the lien of the defaulting party, and that if

issue is joined, that the trial thereof proceed as in ordinary actions. The proceedings on the notice is then usually adjourned to some day beyond the time required for the claimants to file and serve their claims, and as to all such that are not served and filed by that time an order is entered discharging such lien. (*Carroll vs. Coughlin*, 7 Abb., N. S., 72.)

411. In regard to the owner's right to commence the proceedings, the court said: "He may serve notice on the lienors "to appear, and if they fail to appear and file a statement of "their claims within the time prescribed, that the court before "which the lienors are cited to appear may, on proof of service "of the notice and the failure of the lienors as stated, direct a "judgment exempting the property from their liens in the language of section ten, heretofore cited." (*Carroll vs. Coughlin*, 7 Abb., N. S., 72), such judgment may also be rendered whether the party served appear or not. (*Id.*)

412. If the order for issues does not in terms permit a demurrer to the complaint, or a reply to the answer, still the provision in the statute and in the order that the same proceed as is an ordinary action, would probably be construed to allow it, or an application could be made to the court for leave to make such objections as the party may deem proper.

413. If, on the return of the notice, all parties are not served, it may stand over by leave of the court until all are served, or the order may be entered as to those served and the others be brought in afterwards, as in other cases where some of the defendants have not been served. (*Lowber vs. Childs*, 2 E. D. S., 577.)

The Complaint.

414. The pleadings will depend mainly on the facts as to substance, and the form need not differ from those required by the Code in other actions.

No complaint can be better or more reasonable and fair than one that contains "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." (*Code*, § 142.)

415. The facts to be stated means, of course, only those

which the plaintiff must prove to entitle him to recover (*Doughty vs. Devlin*, 1 *E. D. S.*, 625); what those are must be measured by the sufficiency of evidence to prove a fact on the trial, and not the evidence itself; and these facts should be stated according to their legal effect, although they may be stated as they actually exist. (See notes to § 142 *Voorhies' Code*; see post, *Evidence*.)

416. The general rule of pleading, that in stating facts of a case under a statute, care must be taken to show enough to bring the case already within the statute, is particularly applicable to these cases. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Abbott vs. N. Y. Central R. R.*, 12 *Abb.*, *N. S.*, 465.)

417. As these proceedings are generally commenced by a lienor, a complaint by him should show :

(1). The name of the court and the parties, as in any ordinary action, and reference to the proceedings and order to plead. (*Brien vs. Clay*, 1 *E. D. S.*, 649.)

(2). The supposed owner and a full description of the premises. (*Bailey vs. Johnson*, 1 *Daly*, 61; *Duffy vs. McManus*, 3 *E. D. S.*, 657.)

(3). If by a contractor, the contract or delivery of materials or performance of the work, and the nature of them, out of which the claim arises (perhaps the latter need only be stated in the bill of particulars); and if by a sub-contractor, or person engaged by him, this must be alleged.

(4). Value of the materials or labor, and that they were furnished pursuant to a contract, or by, or in accordance with the direction of the owner or his agent, and that a payment is due as in other actions.

(5). Time of performance, showing clearly that it was within the period allowed for filing the lien. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625.)

(6). The time of filing, the notice of lien, and the substance of it, and that it was verified (*Hallahan vs. Herbert*, 2 *Daly*, 253), showing that the statute had been complied with in every particular (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Bailey vs. Johnson*, 1 *Daly*, 61; *Brien vs. Clay*, 1 *E. D. S.*, 649). It is well to attach to the complaint a copy of the notice filed.)*

* This is required by § 2 of the act of 1862, relating to the counties of Kings and Queens.

If the lien has been continued, the time of such continuance should be stated.

(7). Brief statement of how the other defendants are interested, whether as lienors, incumbrancers, grantees or otherwise.

(8). A demand for a judgment against those alleged to be liable by personal contract, and for an accounting between the owner and contractor, and a personal judgment against the owner for any sum found due from him to the contractor at the time the notice was filed, or that has since become due, or so much thereof as will be sufficient to satisfy plaintiff's claim and costs of this proceeding, and for a sale of the owner's interest in the premises at the time the notice was filed to satisfy said judgment against the owner, and for such further and other or different relief in the premises as the court shall be competent to grant.

418. The complaint is required to be more explicit than any other pleading or statement of claim, because it is to set the entire proceedings in motion as to all the parties interested.

419. Where the complaint was predicated solely on the notice of lien, and contained averments of the contents of the notice and the object and intent thereof, without averments of the facts alleged in the notice, separately and independently, on demurrer thereto it was held insufficient, the court said a complaint should aver that notice was filed; that the defendant is the owner; that the work was done in pursuance of a contract, and in conformity therewith. (*Duffy vs. McManus*, 3 *E. D. S.*, 657.)

420. In *Bailey vs. Johnson*, (1 *Daly*, 61,) the court said: "The numerous decisions which this court has made in respect to this law show, that to establish a lien under it by a sub-contractor, there must appear:

"1. That labor or materials have been furnished in the erection of the building in conformity with the contract made by the original contractor with the owner.

"2. That within six months (now three months) a notice in writing, under the sixth section of the act, claiming a lien for the work or materials thus furnished, has been filed with the county clerk.

"3. That at the time of filing the notice of lien, or subsequently, a payment was due, or has since become due, from the owner to the contractor, upon the original contract.

"4. That the contracting owner had some interest in the property at the time the notice claiming the lien was filed." (*Citing, Foley vs. Alger*, 4 E. D. S., 719; *Cox vs. Broderick*, 4 E. D. S., 721; *Dennistown vs. McAllister*, 4 E. D. S., 729; *Ferguson vs. Burke*, 4 E. D. S., 760; *Roberts vs. Fowler*, 3 E. D. S., 632; *Cunningham vs. Jones*, 3 E. D. S., 650; *Conklin vs. Wood*, 3 E. D. S., 662; *Jackson vs. Sloan*, 2 E. D. S., 616; *Carman vs. McInerow*, 2 E. D. S., 684; *Foster vs. Poillon*, 2 E. D. S., 556; *Doughty vs. Devlin*, 1 E. D. S., 625; *Sullivan vs. Brewster*, 1 E. D. S., 689.)

421. A general allegation that three months had not elapsed since the performance of the work, or materials furnished when the notice was filed, or facts showing that to be the case, is necessary. (*Tinker vs. Geraghty*, 1 E. D. S., 687.)

422. If the work has been abandoned by the contractor, the complaint by a sub-contractor must allege this, and also the value of the work and materials placed upon the owner's land, or that a payment is due the contractor from the owner.

423. In *Bailey vs. Johnson*, (1 *Daly*, 61,) it is held that it must affirmatively appear in the complaint by a sub-contractor that a payment is due the contractor from the owner. (See *Maynard vs. Talcott*, 11 *Barb.*, 569.) If this is so, it need not allege the amount that is so due, or to become due, as that is more in the knowledge of the owner and contractor than of the complainant.

424. Where the property is owned by several persons who own distinct parcels thereof, it is not necessary for the complaint to show the distinct parcels owned by each. (*Vermude vs. Beale*, 15 *How.*, 333.) That is a matter to be ascertained by the proof on the trial.

425. If the money has been deposited and held in place of the property, under § 10, sub. 2, before action commenced, the complaint should contain an additional clause showing that fact, and, instead of demanding a sale of the premises, ask judgment that the county clerk be directed to pay said money

over to the party entitled thereto (*Dunning vs. Clark*, 2 *E. D. Smith*, 535), and for personal judgment for any deficiency thereof.

426. If incumbrancers or subsequent grantees are claimed to be fraudulent, it must be particularly alleged. (*Bailey vs. Johnson*, 1 *Daly*, 61; *Meehan vs. Williams*, 36 *How.*, 73.)

427. If *prior* incumbrances are fraudulent or have been paid, it must be particularly alleged, so that they can meet the allegations.

428. Where the owner commenced an equity action in the usual manner, asking, among other things, that the liens be discharged from his property, the court held, on demurrer, that the complaint did not state facts sufficient to constitute a cause of action, and that the action could only be taken under this statute. (*Spratt vs. Nicholson*, 3 *Daly*, 182.)

429. This decision does not, as many infer, hold that the owner can in no case frame a complaint by which he can maintain an equity action against the lienors. Under the previous laws, equity actions could be maintained in certain cases. (*Paine vs. Bonney*, 4 *E. D. S.*, 734; *Westervelt vs. Levy*, 2 *Duer*, 354; *ante*, 260.)

430. If the complaint is deficient in facts it may be demurred to. (*Hallahan vs. Herbert*, 2 *Daly*, 253; *Duffy vs. McManus*, 3 *E. D. S.*, 657; *Heroy vs. Hendricks*, 4 *E. D. S.*, 768; *Bailey vs. Johnson*, 1 *Daly*, 61; *Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Jackson vs. Sloan*, 2 *E. D. S.*, 616.)

431. It may also be set aside on motion for irregularity (*Foster vs. Poillon*, 2 *E. D. Smith*, 556), or to be made more definite and certain. (*Broderick vs. Poillon*, 2 *E. D. S.*, 554.)

Probably a motion would give all the relief that a party could obtain on demurrer for any cause, and a saving of time and would be more equitable to all parties in many cases.

432. Thus, if the complaint shows that the court has no jurisdiction of the subject of the action, or that the plaintiff has no legal capacity to maintain a claim, or that there is another action pending between the parties for the same cause, and that the complaint does not state facts sufficient to constitute a cause of action, a motion could be made by one or more of the

parties who were affected thereby, and have the matter dismissed as to that party, and proceed as to the others, or compel the party to amend by making it more definite and certain.

433. If several causes of action are improperly united, a motion to strike out the objectionable allegations would be equitable.

434. No causes of action excepting those arising out of the same contract or relating to the property, can be joined in the same complaint, either against the owner or contractor. (*Sinclair vs. Fitch*, 3 E. D. *Smith*, 677.)

§ 435. No other relief can be granted in these proceedings than those expressly allowed by the statute. Where an owner has sold or disposed of his property, contingent upon the erection of buildings thereon, and after the vendee has performed his part of the contract, and the vendee then refuses to convey, the vendee can obtain a lien under section 14, and it may be enforced against the property, but he cannot in one proceeding ask a specified performance of the contract, or that the property be sold to satisfy the liens. He may elect which remedy he will pursue. (*See ante*, 86, 87.)

436. If there is a defect of parties, plaintiff or defendant, the plaintiff may be compelled by order to bring them in, or stay all proceedings on his part.

437. When it does not appear how the labor or materials were furnished, the court may require the complaint to be made more definite and certain. (*Broderick vs. Poillon*, 2 E. D. *Smith*, 554.)

438. Whether the *verification* of a pleading in these proceedings requires all subsequent pleadings and claims to be verified according to section 157 of the Code, has never been questioned. When the order for issues required pleadings as in ordinary actions, the same rules govern in one as in the other; therefore if a complaint is verified, the answer to it should be verified; but this would not require all those who only present their claims in a mere formal manner, as in claims for surplus moneys, to have their claims formally verified as required to pleadings under the Code, for they are to "have relief accord-

“ing to the rights of the parties as they shall appear in evidence (§ 2), without regard to matters of form.” (§ 5).

439. But if a party presenting his claim wishes to compel the answer to it to be verified, he must verify his claim in the same form as any pleading. It is in the nature of a counter-claim or cross action, and although a complaint is not verified, if a counter-claim is verified, the reply must also be verified. (*Code*, § 156; *Levi vs. Jacquays*, 4 *How.*, 156.)

440. When a lienor is named as a defendant, or brought into court on the owner's notice, the statement of his claim, particularly if any special relief is asked, must state facts that show he has complied with the statute in order to obtain a lien, and also make a demand for any judgment or special relief he claims to be entitled to in the proceeding. It is, in fact, a complaint, or answer, or reply, relating solely to his claim against any party whose interests are in conflict with his.

441. Where no special relief is claimed, a mere notice of his lien, stating the time of filing, and the amount he claims, and from whom due, and his bill of particulars, would be deemed sufficient to allow evidence to be given to show a valid lien. (§§ 5 and 2).

442. Where the owner admits that a certain amount is due under the contract, and the money has been paid to the clerk, under section 10, before proceedings commenced, and it is held in place of the property after the claimants have been brought into court under this statute (§ 5), may be in the same manner, without formal pleadings, as in application for surplus moneys under rule 77 of the court, (§ 7.) (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284; 2 *Abb. forms*, 677).

443. In the District Courts, the copy of notice of foreclosure is informally treated as the complaint (*Lowber vs. Childs*, 2 *E. D. S.*, 577; *Dixon vs. La Farge*, 1 *E. D. Smith*, 722), and the answer on the return day of the notice may be verbal. There is no provision of law for the service of a complaint or answer in these courts in these cases.

444. The practice is to proceed on the return day on appearance of the respective parties, or otherwise the same as in other

actions in these courts, where no written complaint has been served. (*Id.*, *Bandon vs. Co. Judge R. Co.*, 13 *How.*, 398.)

445. The trial and the form of the judgment is the same as in a court of record in like cases. (*Lennox vs. Trustees, &c.*, 2 *E. D. Smith*, 673).

446. The "objections" to the claim of any party in the proceeding may be made by any party who is to be affected by such claim by an answer thereto, as in ordinary actions. (§ 5.) The answer must contain a statement of the objections of the party interested, and may be a general or specific denial of the material allegations of the claims to which it relates, and may contain a statement of any new matter constituting a defense or counter-claim (Code § 149). All matters that are a legal defense are in fact and law "objections" to the claim of another person. (*Ante*, 408.)

447. A set-off was always allowed in equity, independent of any statutory provision. (*See Story's Eq. Jurisp.*, § 1432 to 1445.)

448. As these proceedings are of an equitable character, a set-off is peculiarly proper. (*Owens vs. Ackerson*, 1 *E. D. S.*, 691.) This reasonably includes recoupment, and set-off, and counter-claim, that is, the extent of set-off to the amount of the claim and judgment for an excess.

449. Under the previous law, which only provided for an offset, it was held that where a sub-contractor made the contractor a defendant, the contractor might set up a counter-claim against him arising out of other matters, and recover judgment for an excess. (*Grogan vs. McMahon*, 4 *E. D. Smith*, 754; *Owens vs. Ackerson*, 1 *E. D. S.*, 691; *Miner vs. Hoyt*, 4 *Hill*, 193; *aff'd Miner vs. Hoyt*, 7 *Hill*, 525.)

450. And a contractor could avail himself of the same defenses as against the sub-contractor that would be available to him if he were sued in the same matter in an ordinary action. (*Id.*)

451. If there are any liens upon the property, and lienors are not made parties to the proceeding, it is a good defense for the owner or contractor, in bar of the proceeding, for they are entitled to have them taken into account in determining the extent of their liability. (*Cronks vs. Whittacker*, 1 *E. D. S.*, 647;

Kaylor vs. O'Connor, 1 *E. D. S.*, 672; *Lehrett vs. Koffman*, 1 *E. D. S.*, 664; *Chamberlain vs. O'Connor*, 1 *E. D. S.*, 665; *Sullivan vs. Decker*, 1 *E. D. S.*, 699.)

452. A prior lien may be a good defense by the owner or contractor to a particular lien, if the prior lien would exhaust the amount due from the owner to the contractor. (*Id.*)

453. Absence of ownership in the defendant at the time of the filing of the notice of lien, is a good defense, entitling him to a judgment for costs. (*Jackson vs. Sloan*, 2 *E. D. S.*, 616; *Grogan vs. The Mayor*, 2 *E. D. S.*, 693; *Grogan vs. McMahon*, 4 *E. D. S.*, 754.)

454. Under the previous law, the defense which the owner had against the proceedings commenced by his contractor were the same as in an ordinary action for the recovery of the value of the work performed or the materials furnished, and therefore he could avail himself of off-sets arising out of other matters than those connected with the contract. (*Owens vs. Ackerson*, 1 *E. D. S.*, 739; *Grogan vs. McMahon*, 4 *E. D. S.*, 754), and could also recover judgment for the excess, if any. (*Id.*)

455. It was also held that damages for the default or other acts of the contractor arising out of the contract could be set up by the owner by way of recoupment against the claim of a sub-contractor or other person. (*Miller vs. Moore*, 1 *E. D. S.*, 739; *Gourdier vs. Thorp*, 1 *E. D. S.*, 697; *Gillen vs. Hubbard*, 2 *Hilt.*, 303.) Where the contract contains a penalty for stipulated damages for not completing in time, those damages should be allowed to the owner as a counter-claim, even as against a sub-contractor, lienor. (*O'Donnell vs. Rosenberg*, 14 *Abb., N. S.*, 59; *Gillen vs. Hubbard*, 2 *Hilt.*, 303.)

456. Damages arising out of the same contract, even though the lien of a sub-contractor is filed before they accrued, must be allowed the owner as against the sub-contractor, because his employment is subject to the terms of the contract with the owner. (*Id.*) (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Gourdier vs. Thorp*, 1 *E. D. S.*, 697; *Miller vs. Moore*, 1 *E. D. S.*, 739.)

457. But whether the owner can set off demands he has against the contractor not arising out of the contract, when the action is between the owner and a sub-contractor or employee

or vendor of the contractor is still unsettled, although it has been discussed by the courts. (*Miner vs. Hoyt*, 4 *Hill*, 193; *Affmd. Hoyt vs. Miner*, 7 *Hill*, 525; *Miller vs. Moore*, 1 *E. D. Smith*, 739; *Owens vs. Ackerson*, 1 *E. D. Smith*, 691; *Devlin vs. Mack*, 2 *Daly*, 94; *Nott's Lien Law*, 128.)

458. A proceeding was commenced by Devlin, a sub-contractor, against Mack, the owner. It appeared on the trial that Mack, the owner, employed Hammond to build a sewer. The job amounted to \$312.30. At the time it became due a suit was pending, brought by Mack against Hammond and another person for trespass in taking away certain flagging from the premises on which the sewer was built. Mack paid Hammond all on his contract excepting \$100, which she was to retain as security for any judgment she might recover in that suit for trespass which was then pending and still undetermined when this action was commenced. This agreement between Mack and Hammond took place on July 5th, 1864, on which day the work was completed. The claimant Devlin's lien was filed on October 3d following. It was held at General Term that the set-off could not be allowed—that the claimant was entitled to judgment. (*Devlin vs. Mack*, 2 *Daly*, 94.)

459. Whenever a counter-claim or set-off arising out of other matters can be allowed as between owner and contractor to affect a sub-contractor, it must have accrued before the filing of the notice by the sub-contractor, and thereupon may be considered the same as a payment under the contract. (§ 3; *Miller vs. Moore*, 1 *E. D. S.*, 739.)

460. The owner cannot set-off his individual claim against a sub-contractor or other person engaged by the contractor for matters other than those arising out of the contract, because there is no contract between him and the sub-contractor.

461. No party other than the owner or a contractor of a claimant can claim recoupment or set-off. If the owner and the contractor are satisfied, no one else can complain. A substantial compliance with the contract is all that is necessary. (*Cunningham vs. Jones*, 3 *E. D. Smith*, 650.)

462. The most equitable disposition of this question is to allow an off-set in all cases between the original parties of em-

ployer and employee, although it may arise out of other transactions with each other, if it does not prejudice the claims of others; but, as between owner and sub-contractor or other persons engaged by the contractor, no offset should be allowed unless it arise directly out of the same claim or contract for which the lien was filed, or, in other words, it must be for damages by way of recoupment for acts of the contractor arising out of his contract with the owner.

463. No offset should be allowed only between those with whom there is a personal contract or those claiming under them, and then such offset should be only such as is allowed under § 150 of the Code, and must have *accrued* previous to the filing of the notice.

464. The sub-contractor or other person engaged by the contractor can easily protect himself against a claim or offset arising out of other matters between the owner and contractor by filing his notice as soon as he commences his work. (See *Devlin vs. Mack*, 2 *Daly*, 94; *ante*, 458.)

465. A counter-claim embraces both set-off and recoupment. (*Pattison vs. Richards*, 22 *Barb.*, 146; *Boston Mills vs. Eull*, 6 *Abb.*, N. S.; 319; *Clinton vs. Eddy*, 1 *Lansing*, 61.)

466. It may be for either liquidated or unliquidated damages. (*Schubart vs. Harteau*, 34 *Barb.*, 447; *Lignot vs. Redding*, 4 *E. D. Smith*, 285.) See what is said as to unliquidated demands. (*Cummings vs. Morris*, 3 *Bosw.*, 560.)

467. A person not claimed to be personally liable cannot set up a counter-claim arising out of other matters. (*Agate vs. King*, 17 *Abb.*, 159.) The right of the plaintiff to claim, and the defendant to counter-claim, must be reciprocal. (*Mayor of N. Y. vs. Parker, &c.*, 12 *Abb.*, 300.) There can be no counter-claim where the plaintiff makes no claim. (*Bellinger vs. Craigue*, 31 *Barb.*, 197.)

468. The complications, evils and delays consequent upon allowing counter-claims by a party against one who makes no claim against him make it apparent that it should not be allowed in these proceedings.

469. A set-off or counter-claim may be demurred to or replied to the same as in any other action. (*Owens vs. Ackerson*, 1 *E. D. S.*, 691.)

470. Sham and irrelevant answers and defenses may be stricken out (*Code*, § 152.), and if a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply for judgment thereon (*Code*, § 247) as in other actions. (*Hallahan vs. Herbert*, 2 *Daly*, 253.)

Bill of Particulars.

471. The bill of particulars in these proceedings is the same in substance as in ordinary actions. A party may be required to give any other party a bill of particulars of an alleged claim which may interfere with the rights of the party demanding it. It must be prepared and served in the same manner as in other actions (*Code*, § 158), and must include all the items of the alleged claim, as no recovery can be had for any work, &c., not included in it. (*Lutz vs. Ey*, 3 *E. D. S.*, 621; 1 *Phil. Ev.*, 4th ed., p. 801; *Bowman vs. Earle*, 3 *Duer*, 691.)

472. A bill of particulars "is regarded as an amplification of "the pleading to which it relates, and is to be construed as "forming a part of it." (*Bowman vs. Earle*, 3 *Duer*, 691; *Melvin vs. Wood*, 47 *N. Y.*, 428; *do.*, 3 *Keyes*, 536.)

473. The several items should be stated with dates and amounts. (*Kellogg vs. Paine*, 8 *How.*, 329; *Seaman vs. Low*, 4 *Bosw.*, 338.)

474. If the owner has any demands which he desires to offset against the claimant, he should serve a bill of particulars, if the same is demanded. (*Gourdier vs. Thorp*, 1 *E. D. Smith*, 697.)

475. In an action by a contractor against the owner, it was held that the plaintiff was not entitled to a bill of particulars where the answer was that the work was not done in accordance with the contract, or that the contract had not been performed. (*Id.*)

476. Nor is it necessary when the owner seeks to recoup damages for imperfection in the work. (*Id.*) It can only be required when a set-off is claimed. (*Id.*)

477. A plaintiff is not bound to furnish particulars of payments by defendant which the plaintiff credits him in the complaint, (*Williams vs. Shaw*, 4 *Abb.*, 209; *Giles vs. Betz*, 15 *Abb.*, 285; *Watt vs. Watt*, 3 *Rob.*, 685.)

478. Where the claimant is a sub-contractor or other person engaged by the contractor, the court can direct the service of a bill of particulars of any claim the owner may make against the contractor (*Fullerton vs. Gaylord*, 7 Rob., 566; *Code*, § 158), or relief may be had on motion to make the matter more definite and certain. (*Broderick vs. Poillon*, 2 E. D. S., 554.)

479. If the claim which the bill of particulars represents is verified, the bill of particulars must be verified in the same manner as a pleading. (*Code*, § 158.)

480. If the bill of particulars or account delivered after a demand or order is not satisfactory, a motion should be made promptly for a further account. (*McKinney vs. McKinney*, 12 How., 22; *Brown vs. Wood*, 2 Hilton, 579.) The motion may be made after order of reference, and after the trial has commenced before the referee. (*Cadwell vs. Goodenough*, 28 How., 479; *Id.*, 3 Rob., 633.)

481. If a defective bill of particulars is served, the proceedings will not be dismissed for that reason. (*Brown vs. Wood*, 2 Hilt., 579.)

482. A party refusing to furnish a copy of his account can be precluded from giving evidence thereof. (*Code*, § 158; *Goings vs. Patten*, 17 Abb., 339.) An order precluding such evidence should be obtained from the court prior to the trial. (*Kellogg vs. Paine*, 8 How., 329.)

483. The case of *Lutz vs. Ey* (3 Abb., 473; 3 E. D. Smith, 621) seems to hold that items not included in the account cannot be recovered for if objected to on the trial. (*Code*, § 158.)

484. This mode of arriving at the issues and claims of the respective parties necessarily arose under the law of 1851 (*Ante*, p. 12.) Under that law the issues were only between the owner and the lienor, unless he intended to contest the claims of others prior to his claim, and then they were to be made parties, and the complaint must contain sufficient allegations to show a cause for making them parties. (*Kaylor vs. O'Connor*, 1 E. D. S., 672; *Nott's Lien Law*, 35.)

485. Under the amendment of 1855 (*Ante*, p. 1), the sub-

contractor might make the contractor a party, and then he could obtain personal judgment against him.

486. The property was to be sold subject to prior incumbrancers if they were not parties, and if there was a surplus other subsequent lien holders must be notified, and the court must distribute such surplus among the parties entitled thereto, and might order a reference to take proofs in relation to their rights and priorities (§ 3.)

487. The owner could not commence proceedings, but could terminate any lien on thirty days notice, unless the lienor commenced to foreclose, (§ 11, *sub.* 4.)

488. The New York Common Pleas, under the Act of 1851 and '55, had exclusive original jurisdiction in those cases and in appeals from those tried in the Marine and District Courts. From that time until the present there have been numerous cases reported, and of these only five were originally brought in the Superior Court, and none in the Supreme Court, both of which, under the law of 1863, have original jurisdiction, but since that time they probably have not had a dozen cases in all—the Common Pleas completely monopolizing that class of cases, because of the familiarity in that court, and of their referees and clerks, with the embarrassing questions to those not familiar with the practice, that constantly arise in them.

489. That practice *established* by the Common Pleas is almost as old as the Code itself, and although not in terms retained by the law of 1863, it plainly contemplates a continuance of it (§ 5 and § 7). This introduces us again to the once familiar practice of the former *cross-bills in equity*, although still proper under the Code, (§ 274, § 122), are now seldom used as to litigation between co-defendants, the rules of the court had impliedly postponed nearly all such questions in mortgage foreclosure cases, where they would most frequently arise, until it is ascertained that there will be a surplus, and then they may be disposed of in a summary manner under those rules (72, 73, 77) without resorting to formal pleadings.

490. Under the acts of 1851-'55, when subsequent lienors were not made parties on the foreclosure of a prior lien, the Superior Court, at General Term, said that a cross action would

be proper in lien cases where there were parties that disputed the various claims of each other. (*Westervelt vs. Levy*, 2 *Duer*, 354.)

491. Hoffman, justice, said that the Code had done no more than adopt the former Chancery practice in relation to cross actions, and then cites authorities as to the practice in such case. (*Wells vs. Smith*, 7 *Abb.*, 261.)

492. "I am aware that the Code contains a provision "enabling the court to determine the ultimate rights of the "parties on each side as between themselves (§ 274); but the "court is not necessarily required to make such determination, and I conceive that in order to do so in a common "law action, *allegations in the nature of pleadings should first be "allowed to be put in between the parties who become adverse "litigants.*" (*Denio, J., in Decker vs. Judson*, 16 *N. Y.*, 439.)

493. A cross bill for relief is used in equity to settle conflicting claims between co-defendants which it is found necessary to adjust before a complete decree can be made upon the subject matter of the original suit, and the rights of the parties therein. (*Story's Eq. Pl.*, § 392; *Mitford Pl.*, 81, 2 *Barb. Ch. Prac.*, 127;) it may be legal or equitable. (2 *Barb. Ch. Prac.*, 129.) This happens where persons in opposite interest are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and yet the determination of their interests is necessary to a complete decree upon the subject matter of the suit. (*Id.*, 2 *Barb. Ch. Prac.*, 127.)

It is always necessary, where the defendant is entitled to some positive relief beyond what the scope of complainant's suit will afford him. (*Pattison vs. Hull*, 9 *Cowen*, 747; 2 *Barb. Ch. Prac.*, 129.)

494. It must be confined to the matters stated in the original bill, and should not introduce new and distinct matter not embraced therein, and if it does so, no decree can be founded upon these matters, for as to them it is an original bill. (*Story's Eq. Pl.*, § 401; 2 *Barb. Ch.*, 130-133.)

495. It should state the parties, prayer and object of the original complaint and the proceedings therein, and the rights of the party who is complainant, which are necessary to be

made the subjects of the cross-litigation, or the grounds on which the defendant resists the claim of the plaintiff in the original complaint, and the equities he sets up between him and his co-defendants, and should distinctly set up the relief which the defendant claims. (2 *Barb. Ch. Prac.*, 131-132; *Mitf. Pl.*, 81-82; *Story's Eq. Pl.*, § 401.)

496. The matters of defense upon which a cross-bill is founded must be stated in the answer to the original suit as well as in the cross-bill. (2 *Barb. Ch. Prac.*, 129.)

497. And the court itself will, sometimes, at the hearing, in its discretion direct a cross-bill to be filed, when it is necessary to bring before the court the rights of the parties and the matters necessary to a just determination. (*Field vs. Schaffelin*, 7 *John, Ch. R.*, 252; *Story's Eq. Pl.*, § 396; *Mitf. Pl.*, § 2; 2 *Barb. Ch. Prac.*, 130; *Code*, §§ 122-274.)

498. If a creditor, who has come in under a decree in favor of creditors against a debtor, should require relief for the purpose of assisting the investigation of demands affecting the estate, before the master, which relief cannot be obtained under the original bill, or by a re-hearing, he may, even without the direction of the court, file a cross-bill for the purpose. (*Story's Eq. Pl.*, § 397; 2 *Barb. Ch. Prac.*, 130.)

499. Other parties may be joined in a cross-bill, but it must show that they are necessary parties to the question in controversy in the original bill. (*Smith vs. Howard*, 20 *How.*, 151.)

500. A cross-bill being generally considered as a defense to the original bill or as a proceeding necessary to a complete determination of a matter already in litigation, it is treated as a dependency upon the original suit. (*Story's Eq. Pl.*, §§ 399-400.)

501. A plea to the person does not lie to a cross-bill unless for non-joinder of any other party, nor it does not lie to the jurisdiction of the court, because the filing of the bill has affirmed the sufficiency both of the person and the jurisdiction. (2 *Barb. Ch. Prac.*, 133.)

503. A cross-bill which is filed by the special direction of the court for the purpose of obtaining its decree touching some matter not in issue by the former bill, or not in issue between

the proper parties, does not seem liable to any peculiar cause of demurrer. Being by order of the court there is little probability that it should be liable in substance to any demurrer. (*Mitf. Pl.*, 203 ; *Barb. Ch. Prac.*, 133.)

504. It cannot be affected by a dismissal of the original bill. (2 *Barb. Ch. Prac.*, 127.)

505. It lies although the original suit has abated. (*Brown vs. Story*, 2 *Paige*, 594 ; 2 *Barb. Ch. Prac.*, 129.)

506. Under the existing practice, if such issues are not formed by the order of the court, it can be done by original process as formerly. (2 *Barb. Ch. Prac.*, 130.)

507. A stay of proceedings was granted against the original suit on notice, (*White vs. Buloid*, 2 *Paige*, 164) until issue was joined in the cross-suit, and then an *ex-parte* order was obtained that they be heard together. (2. *Barb. Ch. Prac.*, 134.)

508. Where the pleadings are put in by order of the court, as is the practice in lien cases, no original process is required, the order for the issues must be served and should be referred to in the complaint.

509. The cross-complaint is to be served on each of the parties (against whom any relief is sought) named as defendants in it. The defendants must put in their answers to the cross-complaint the same as to an original complaint, and the effect of not answering will be the same as that of not serving a reply to a counter-claim under the Code. (2 *Van Santvoord's Eq. Prac.*, 227.)

510. The marshaling of securities or of assets may be obtained by answer where the plaintiff in an original suit is interested, but when only one or more of the co-defendants are interested it must be by cross-complaint, by original process, or allegations in the nature of pleadings, by order of the court on motion. (*Decker vs. Judson*, 16 *N. Y.*, 439 ; *Farmers' L. & Trust Co. vs. Seymour*, 9 *Paige*, 538.)

CHAPTER V.

MODES OF TRIAL.

511. If the parties notified neglect to appear and object, or insist on any claim, or suffer a default, the parties, if lienors, commencing the proceedings must show a *prima facie* case, as if on appearance (§ 7.)

512. If the proceeding is commenced by the owner on the return of the notice, and on proof of due service on the parties if they do not appear, an order may be entered exempting the property from the liens without any other proof. (*Carroll vs. Coughlin*, 7 Abb., N. S., 72.)

513. If a defendant serves notice of appearance before the time to answer expires, but takes no further steps, he is still entitled to eight days notice of time and place of proof of claims. (*Code*, § 246; *Kelly vs. Searing*, 4 Abb., 354.)

514. Notices of trial, and of motion, and of argument are the same, as to length of time, &c., as in ordinary actions.

515. The court may, in all cases, determine the rights of all the parties, and the amounts due to each, and by whom to be paid, and may order any question to be tried by a jury, or refer the whole matter to a referee to examine and pass upon the rights of the respective parties and report the same (§ 7). On such trial "every party shall be at liberty to take proofs for "and against any claim or lien, and such judgment or decree "shall be made thereon as to the rights and equities of the "several parties among themselves and against any owner as "may be just." (§ 7.)

516. The mode of trial, whether by the court or jury, or referee, as to any or all of the questions involved, and the authority and power given by § 7, is the same as in other actions under the Code. (§§ 254, 271, 272.)

517. The usual disposition of these cases, after issue joined, whether by formal pleadings or by the service of claims, or where testimony is to be taken, is to refer the entire matter to a referee to determine all the rights of the parties, and the amounts due to each, and by whom to be paid. Such referee

has all the power of a court on the trial of an issue, (§ 7, *Code*, § 272.)

518. When intricate questions of law may arise, the court frequently refer one or more of the questions of fact to a referee to report thereon. In such case the report has the effect of a special verdict. (*Code*, § 272.)

519. If any party to the proceedings desire a trial by jury of the whole issue or any specific question of fact involved therein, he must apply to the Court (under Rule 40), the same as in other equity actions.

520. "The court shall proceed without regard to matters of *form*, which shall be amendable at all times, and without *costs* judgment shall be rendered according to the equity and *justice of the claims of the respective parties.*" (§ 5.)

521. When the referee is to report upon one or more of the questions of fact (and *not on the whole issues*) he has no power to allow amendments, only the *court* has the power in such case. Section 272 of the *Code*, as to amendments, to be allowed by the referee, only applies when the trial by him is of *all the issues*. (1 *Van Santvoord's Eq. Prac.*, 523.)

522. The last sentence in § 5 has not extended that power of the *referee*. Therefore where the referee is to report upon one or more questions of fact, unless it be of *all the issues*, he has no power to allow an amendment; an application to amend must be made to the court. A distinction must be kept in view between matters of form and matters of *substance*, under §§ 5, 2.

523. Under the law of 1851, the court allowed amendments to the same extent as in ordinary actions. (*Doughty vs. Devlin*, 1 *E. D. Smith*, 625; *Beals vs. Cong. B. J.*, *do.*, 654; *Foster vs. Skidmore, do.*, 719; *McSorley vs. Hogan*, 1 *Code Rep.*, N. S., 285.)

524. As to the power of the Marine and District Courts to refer under § 7, that question relates to jurisdiction, and may be found in the chapter that discusses that subject. (*Ante.*)

525. In § 7 of the act, reference is made to mode of procedure in ascertaining the rights of claimants to the surplus money arising out of the sale of premises under a decree in the

foreclosure of a mortgage (*rule 77*). There is no more difficulty in applying the latter mode of procedure in lien cases than in mortgage cases—of course the more contestants there are in either case, the more complicated will it be. This is not owing to the mode of procedure, because if justice and a fair opportunity is given to the contestants, many of the same complicated questions must arise under any mode of ascertaining the rights of the respective parties.

526. Under this act at present the procedure may be precisely as it was in mortgage cases prior to the Chancery Rules of 1830, only instead of a cross bill for relief by original process between the parties who were incumbrancers, to ascertain their rights among themselves, the issues between co-defendants in lien cases are now ordered by the court to be formed by the service of pleadings under § 5.

527. Formerly in mortgage cases the rights of the incumbrancers with respect to each other were required to be ascertained and reported upon by a master in Chancery previous to the decree of sale. (*Renwick vs. Macomb*, *Hopk. Ch.*, 316; *Tower vs. White*, 10 *Paige*, 395). This was by means of original cross-bills for relief, filed by the contesting incumbrancers. The effect of this was to delay the mortgagee in the foreclosure of his mortgage, because the practice was then established in all cross-actions to grant a stay of proceedings against the original suit until issue was joined in the cross-suit (*White vs. Buloid*, 2 *Paige*, 164), and then an *ex-parte* order was obtained that they be heard together. (2 *Barb. Ch. Prac.*, 130).

528. In 1840 an act was passed for reducing the expenses in foreclosure cases (*chap. 342*), and § 9 provided that it should not be necessary that any person having a *judgment* or *decree*, or claim, under either of them, *subsequent* to such mortgage be made a party to such suit of foreclosure, but they could still under the Chancery Rule (136), as amended pursuant to that act, reach the surplus arising on such sale. This former part of the act of 1840 was repealed in 1844, (*chap. 346*, § 5), and the practice under rules 134 and 136, as amended in 1840, the same as now regulated by Supreme Court Rules (72, 73–77), has since prevailed, excepting as to the *nature* of the liens on the surplus.

529. To change the practice in foreclosure of mortgage cases on that point, the rules (134 and 136) as amended in 1840, provided in effect that if there was no right or interest set forth by answer *adverse* to that of the mortgages, the defendants could not litigate among themselves to the prejudice of the plaintiff in the foreclosure suit, they could wait until it was ascertained that there would be a surplus. (*Union Ins. Co. vs. Rensselaer*, 4 *Paige*, 85; *Farmer's Loan, &c., Co. vs. Seymour*, 9 *Paige*, 538; *Tower vs. White*, 10 *Paige*, 395.)

530. These rules also provided how the litigation as to the claims for the surplus could be determined in a summary manner (*Rule 136*). This was merely postponing certain questions until another time for adjudication, with as little delay to the parties as possible, and without depriving them of any of their legal rights and remedies.*

Original cross bills for relief could still be filed (*King vs. McVickar*, 3 *Sand. Ch.*, 182) by the defendants in a foreclosure suit the same as before, but where they had no interests *adverse* to the claim of the plaintiff they would not be permitted to delay his proceedings by litigating their claims between themselves (*Farmers' Loan & Trust Company vs. Seymour*, 9 *Paige*, 538). But if it appeared in the cross suit that a stay of proceedings was necessary to protect the rights therein claimed, a stay would still be ordered in the foreclosure suit. (*Id.*)

531. The rule (136) as amended in 1840, only allowed claims for liens by *judgment* or *decree* upon the surplus money in foreclosure cases. The Supreme Court Rule (48), previous to 1858, contained the same provisions; but since that time it has been, as now, silent as to the kind or nature of liens that may be established in such cases (77). It seems to have been otherwise when the case of *King vs. West* (10 *How.*, 333,) was decided; see also the dissenting opinion in *Mutual Life Insurance Company vs. Bowen*, 47 *Barb.*, *618.†)

* The courts in this State have no authority to make rules that will change or abolish the remedies secured by law, they can only regulate the administration of them. (*See Laws 1827*, ch. 250, § 2, 2 *R. S.*, 2d ed., p. 104, §§ 51-57; *Laws 1840*, chap. 342, § 7, *Code*, §§ 469-470; *Laws 1870*, ch. 408, § 13).

† The authentic editions of the rules of the Supreme Court, as they have been amended from time to time, may be found in the various editions of Voorhies' Code, by Townshend.

532. In such cases, where the plaintiff is not interested in priorites, the claims of the defendants are now usually had after the sale, and it is ascertained that there is a surplus. (*Rule 77*; *Livingston vs. Mildrum*, 19 *N. Y.*, 440; *Kirby vs. Fitzgerald*, 31 *N. Y.*, 417; *Schafer vs. Reilly*, 50 *N. Y.*, 61; *Mutual Insurance Company vs. Bowen*, 47 *Barb.*, 618; *N. Y. Life Insurance Company vs. Vanderbilt*, 12 *Abb.*, 458.)

533. The question of the Marshaling of Securities, if the plaintiff is interested therein, and the amount due to prior incumbrancers in mortgage cases are now, as formerly, to be ascertained in the action by pleadings and proofs between the parties, either by answer or by order of the court, or cross action by original process *before* the decree of a sale, and must be provided for therein. (*Tower vs. White*, 10 *Paige*, 395; *Holcomb vs. Holcomb*, 2 *Barb.*, 20, rule 72; *N. Y. Life & T. Co. vs. Cutler*, 3 *Sand. Ch.*, 177; *King vs. McVickar*, 3 *Sand. Ch.*, 192; *Beekman vs. Gibbs*, 8 *Paige*, 511.)

534. In a suit to foreclose a mortgage, a junior mortgagee who is a party to the suit, may have a decree directing a sale of so much of the mortgaged premises as will be sufficient to satisfy the amount due on such junior mortgage and all intermediate liens and incumbrances, in addition to the amount of the complainant's mortgage and costs. But before such junior mortgage can be paid, the report of sale must be filed, and the surplus moneys brought into court, so that others who have not been made parties to the suit, may have an opportunity to apply for such surplus under the rule. (*Beekman vs. Gibbs*, 8 *Paige*, 511.)

535. The ascertaining the rights of the subsequent incumbrancers and respective claimants to the surplus are very properly regarded as in the original action (*Chamberlain vs. Dempsey*, 36 *N. Y.*, 144), and costs are allowed between the contesting parties on that principle and an order made upon the referee's report as to the distribution of such moneys, may be appealed from to the General Term as an interlocutory order made at Special Term. (*Kirby vs. Fitzpatrick*, 18 *N. Y.*, 484, and 31 *N. Y.*, 517; *Schafer vs. Reilly*, 50 *N. Y.*, 61; *Mutual Ins. Co. vs. Bowen*, 47 *Barb.*, 618), and is also heard in the Court of Appeals, as an appeal from an interlocutory order at Special

Term (*Id.*) For a judgment is not regarded as final until all the rights of the parties in the action are determined (*Code*, § 254; *Mutual Life Ins. Co. vs. Bowen*, 47 *Barb.*, 618; *Smith vs. Lewis*, 1 *Daly*, 452.)

536. The order of reference obtained on motion by a party, or a person who has served notice of claim in such case may be broad enough to ascertain and determine the rights of any of the claimants to the surplus. (*Livingston vs. Mildrum*, 19 *N. Y.*, 440; *Mutual Ins. Co. vs. Bowen*, 47 *Barb.*, 618; *ante*, 531.)

537. Issues may be formed to try any question between the contestants by order of the Court, on application of any party interested. (*Id.*, *Decker vs. Judson*, 16 *N. Y.*, 439.)

A cross action by original process can also be maintained in regard to the surplus, the same as it could previous to 1840, in the original suit. (*Kirby vs. Fitzpatrick*, 18 *N. Y.*, 484; *Farmers' L. & T. Co. vs. Seymour*, 9 *Paige*, 537.)

538. The usual order of reference is "to ascertain and report the amount due the said (naming the claimants), or to any other person which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon," &c. (2 *Abb. Forms*, p. 679.)

539. As difficult and important questions may arise under such an order, as if it was "to hear, try and determine the rights, &c., of the claimants," &c. (*See Lawton vs. Sager*, 11 *Barb.*, 350; *Noyes vs. Burton*, 17 *How.*, 449; *Mutual Ins. Co. vs. Bowen*, 47 *Barb.*, 618; *Schafer vs. Reilly*, 50 *N. Y.*, 61.)

540. In a proceeding for the distribution of surplus moneys, arising from the sale of mortgaged premises, the reference as to liens upon the surplus moneys is not a mere collateral reference, but is a direct issue, to be determined before the Court can finally and completely administer the whole of the fund (*Mutual Life Ins. Co. vs. Bowen*, 47 *Barb.*, 618). In such case, on the foreclosure of the first mortgage, the holders of a fourth mortgage may set up before the referee, issuing in a third mortgage, and it may be adjudged that such mortgage is void and not a lien on the surplus. (*Id.*, but see *Chamberlain vs. Dempsey*, 36 *N. Y.*, 144, and *Carow vs. Kelly*, 59 *Barb.*, 239.)

541. Parties who are made defendants as subsequent incumbancers, and whose interests are correctly set forth in the complaint, merely serve notice of appearance, and after the sale and notice of surplus seldom file or serve a written notice of their claim, but on the hearing before the referee, in regard to the surplus, they produce a statement and prove their claims, and are at liberty, and as is frequently done before the referee, "he takes proofs for or against any claim or lien and reports "upon the same in a summary manner."

542. The notice of hearing in such cases before the referee, or after a decree of sale, is *summary*, being by a referee's summons, the length of time for its return being in the discretion of the referee. (*Kelly vs. Scaring*, 4 *Abb.*, 351.)

543. The referee's report in foreclosure cases under the usual form is regarded as an interlocutory proceeding, and the evidence is reported to the Court, as contemplated in Rule 77, and the proceeding (*Kirby vs. Fitzgerald*, 31 *N. Y.*, 417) is under Rule 39. The referee is *not* to "hear, try and determine," &c., in which latter case the exceptions are not to be heard in the first instance at Special Term.

544. The Court has the power under § 271, sub. 3, and § 254 of the Code, to order a reference of any and all the questions that can arise in regard to surplus moneys in foreclosure cases (*Mutual Ins. Co. vs. Bowen*, 47 *Barb.*, 618; *Kirby vs. Fitzpatrick*, 18 *N. Y.*, 484), and have the referee's report thereon stand as the decision of the Court (*Code*, § 272), in which case no notice of filing or confirmation of the report would be necessary, as required by Rule 39, and the exceptions could only be heard in the first instance at the General Term.

545. The rule (77) does not prohibit such a course of disposing of these questions in those cases, but is in connection with Rule 39, merely directory as to the practice which may be pursued in foreclosure cases.

546. The judgment and subsequent proceedings in lien cases under the act of 1855 §§ 1, 2, 3, were the same in form and substance as those now required by Rules 73 and 77 on foreclosure of mortgages.*

* The law of 1862 (ch. 478,) relating to liens in the counties of Kings and Queens, is precisely like the law of 1855 on these points.



EVIDENCE.

547. The effect of the act of 1863, under the practice now prevailing, is merely to transfer all questions that can arise between the parties in these proceedings back before judgment of sale, which again in effect restores the former practice as to the mode of ascertaining the rights of the parties that existed in foreclosure of mortgage cases prior to the Chancery Rules of 1830.

548. This practice of confirming a referee's report on surplus in mortgage cases arose under the former Chancery practice, when a Master could only report the *facts* to the Court. He could not, like a referee under the Code, decide all the issues or questions of law, based upon the facts found by him, and his report did not in any case stand as the decision of a judge, so that judgment could be entered thereon without confirmation. Application to the Court for confirmation was in all cases necessary.* This practice was in part necessary under the Code (§ 272) previous to the amendment of 1851, which required the referee to state the facts found by him, and his conclusions of law thereon, separately. It can now easily be determined where the referee errs, whether it is on questions of fact or of law.

549. When the money has been deposited, under sub. 2 of § 10, before proceedings, the mode of ascertaining to whom it belongs may be precisely the same, by an order entered on the return of the notice, as in application for surplus moneys in mortgage cases (*Hubbell vs. Schreyer*, 14 *Abb., N. S.*, 284). It would make no difference who deposited the money, the claims to it could be ascertained in the same manner, and an order made distributing it among the persons and in the manner the Court or referee might direct.

CHAPTER VI.

THE EVIDENCE.

550. It is also provided that "all persons having liens, in order to enforce the same, shall *prove* their demands in the same manner as in ordinary actions at law, except that no variance as to the persons named as *contractor, owner*, or

* See *post*, 720 and note.

"debtor in the lien, notice, or bill of particulars, or statement of claim, or in any pleading, shall impair or affect the rights of the claimants, as hereinafter defined, and every party shall have relief according to the rights of the parties as they shall appear in evidence" (§ 2.) It is also provided that "the issues thus made shall be tried as in ordinary actions" (§§ 2, 5.)

551. Parties to the proceedings can therefore be examined as witnesses in the same manner and to the same extent as in ordinary actions under the Code.

552. In regard to the *burden of proof*, where issues of fact are joined, the Code (§ 168) provides that every allegation of the complaint (or statement of claim), not controverted by the answer, and every material allegation of new matter in the answer constituting a counter-claim, not controverted by the reply shall, for the purposes of the action, be taken as true. This is only a statutory declaration of the long established rule of evidence that "He who asserts a thing must prove it" (1 *Greenleaf Ev.*, § 74). It further prescribes that "the allegations of new matter in the answer (not relating to a counter-claim), or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require." (Code, § 168.)

253. As to the *evidence necessary to sustain a lien* or bring it to a judgment, it would seem to be substantially the same on the part of the claimants that appear, whether the owner or contractor, or other parties, appear or not. (§ 7.)

554. Parties alleging a claim must prove it (unless it is admitted by the answer or demurrer to it.) A *prima facie* case must be made out. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625.)

(1). Proof of service on all the parties that do not appear is necessary, the same as in other cases.

(2). The filing of the lien being a jurisdictional fact, and the existence of the lien the foundation of the whole proceedings (*Cronkright vs. Thomson*, 1 *E. D. S.*, 661), proof of the filing of the notice of lien, and the time thereof may be made by a copy of it, duly certified by the county clerk.

(3). The time when the work was performed or the materials

were furnished (*Tinker vs. Geraghty*, 1 *E. D. S.*, 787). There is some question as to whether it must appear that the notice of claim was filed within the time required by § 6, unless required by some party interested, as that is a matter of defense. (*Lutz vs. Ey*, 3 *E. D. S.*, 621.)

In the case of *Tinker vs. Geraghty* (1 *E. D. S.*, 687), Judge Woodruff said it must appear on the trial that the notice of claim was filed within the time required by the statute.

(4). The existence of a contract expressed or implied between the owner and contractor, authorizing the performance of the work and the delivery of the materials, or that the work was done or materials furnished in pursuance of an employment by the owner, or by or in accordance with his directions, or the directions of his agent (§ 1, *Dixon vs. La Farge*, 1 *E. D. S.*, 722; *Walker vs. Paine*, 2 *do.*, 662), and this too, whether the claim is by a contractor or sub-contractor, or other claimant. (*Id.*)

The claimant must also show that the labor was performed, or the materials furnished in conformity with the terms of such contract or employment, or direction. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Dixon vs. La Farge*, *do.*, 722; *Gay vs. Browne*, *do.*, 725; *Pendleburg vs. Meade*, *do.*, 728; *Walker vs. Paine*, 2 *do.* 662; *Bailey vs. Johnson*, 1 *Daly*, 61.)

(5). That the defendant is the owner of or has an interest in the building or land upon which the lien is claimed (*Bailey vs. Johnson*, 1 *Daly*, 61). If there is an averment of ownership, which is not denied, nor a recovery not objected to, for want of such proof a judgment will not be reversed, though no evidence of ownership was given on the trial. (*Dixon vs. La Farge*, 1 *E. D. S.*, 722.)

(6). Under § 1 of the law of 1851, it was held that the claimant must show, before he was entitled to recover against the owner, that a payment had become due, according to the terms of the contract with, or employment by, the owner, whether the claimant was a contractor or sub-contractor, or other person dealing with the contractor. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Hauptman vs. Halsey*, *do.*, 668, *Sullivan vs. Brewster*, *do.*, 689; *Spaulding vs. King*, *do.*, 717; *Pendleburg vs. Meade*,

do., 728; *Miller vs. Moore*, do., 739; *Cox vs. Broderick*, 4 do., 721; *Bailey vs. Johnson*, 1 *Daly*, 61.)

Under the present law it is held the same. (*Schneider vs. Hobein*, 41 *How.*, 232.)

555. It has been held (*Bailey vs. Johnson*, 1 *Daly*, 61) that a complaint under the old law by a sub-contractor, although alleging performance of the contract, must allege that a payment is due from the owner to the contractor. This, in effect, holds that such allegation must be affirmatively proved by the sub-contractor before a recovery can be had against the owner, because it is not necessary to allege anything that it is not necessary to affirmatively prove in order to recover. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625.)

556. Previous to the law of 1863, a sub-contractor could not recover against the owner when the contractor had abandoned the job, and had not become entitled to a payment because of such abandonment (*Cunningham vs. Jones*, 3 *E. D. S.*, 650; *White vs. Hewitt*, 1 *E. D. Smith*, 395; *Neville vs. Frost*, 2 *E. D. Smith*, 62; *Paige vs. Ott*, 5 *Denio*, 406). Section 6, of the act of 1863, has altered that rule as to sub-contractors, and if the work has been abandoned by the contractor, a lien may be obtained by him (see *ante*.) The sub-contractor cannot now recover against the owner when the contractor cannot, *only in cases where the contract has been abandoned by the contractor*. (See post "The Contract.")

557. The sub-contractor is entitled to an accounting under his lien at any time he sees proper to ask it. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625).

558. If the claimant, a sub-contractor, shows that the work was done, or materials furnished, in pursuance of an employment by the owner, or by or in accordance with his directions or the directions of his agents (*Dixon vs. La Farge*, 1 *E. D. Smith*, 722), and that the debt is due him from his contractor therefor, and that *the contract* is completed or abandoned, he has made a *prima facie* case, and can maintain the action.

559. When a building or other work is completed, the presumption of law is that payment has become due, unless there appears to be an agreement to the contrary. (*Tipton vs. Feitner*,

20 N. Y., 423 ; *Pollock vs. Ehle*, 2 E. D. S., 541 ; *Cunningham vs. Jones*, 3 E. D. S., 650 ; *Sullivan vs. Brewster*, 1 E. D. S., 689).

560. It is sufficient in the first instance for the claimant, a sub-contractor, to prove performance by the contractor, and it then devolves upon the owner to prove payment to the contractor. (*Rudd vs. Davis*, 1 Hill, 277.*)

561. If there is nothing due from the owner to the contractor by the terms of the contract, or he has paid the contractor, in a proceeding by a sub-contractor, the owner must set it up as a defence. It is sufficient if the claimant shows a *prima facie* case. (*Rudd vs. Davis*, 1 Hill, 277.)

In *Doughty vs. Devlin* (1 E. D. S., 625), the court says : " The plaintiff is not bound to negative a possible defence. It is enough if he shows a *prima facie* right to recover. The statute gives him the lien and the right to institute proceedings to test its extent and enforce it at any time after his work is done. If payment to the original contractor is a good defence to the owner, he must set up such payment in his answer." (*Cronks vs. Whittacker*, 1 E. D. S., 647).

562. But in order to obtain a *personal judgment against* the owner, he must proceed further if he is a sub-contractor, and show that there is a payment due or to become due to the contractor, or that the work has been abandoned, and that the owner is liable for a definite amount under the statute (*Bailey vs. Johnson*, 3 Daly, 61). The present law is held to be the same on that point as the previous law. (*Schneider vs. Hobein*, 41 How., 232).

563. Where a *sub-contractor* is prevented from performing the whole of his contract with the contractor, by reason of the failure of the latter, and an assignment by him of the contract for the benefit of his creditors, the sub-contractor may acquire and enforce a lien for the value of his labor and materials performed and furnished up to the time he was prevented. (*Henderson vs. Sturgis*, 1 Daly, 336.)

* This case (1 Hill 277) was a reversal on that point. That was under the statute of 1830, when the sub-contractor could only recover the *amount due* the contractor, after the same had been ascertained and adjusted, as provided by the statute, then the sub-contractor could sue for it as in an action for money had and received.

564. Hindrance by one party to a contract, whereby the other party is prevented from completing his part of the contract by the time stipulated, affords a legal excuse for non-performance within such period. (*Stewart vs. Keteltas*, 36 N. Y., 388.)

565. If the money has been deposited under § 10, sub 2, and is still in the clerk's hands, it must be shown on the trial by a certificate of the county clerk, and judgment rendered accordingly. (*Dunning vs. Clark*, 2 E. D. S., 535.)

566. If a notice of lien has been continued by an order of the court, it must appear by the certificate of the county clerk that the entry of the continuance has been made. The obtaining of the order is not sufficient. (*Barton vs. Herman*, 8 Abb., N. S., 399.)

567. It will be sufficient in some instances to show that an order of continuance has been filed with the clerk, for then it is presumed that he did his duty by making a new docket. (*McGuckin vs. Coulter*, 10 Abb., N. S., 128.)

568. It must be affirmatively shown that the lien is still continuing under the statute. (*Mushlitt vs. Silverman*, 50 N. Y., 360; *O'Donnell vs. Rosenberg*, 14 Abb., N. S., 59; *Freeman vs. Arment*, 5 Leg. Obs., 381.)

569. A lien will attach before anything has become due from the owner to the contractor. It is sufficient if money may become due afterwards which the owner may be compelled to apply to the satisfaction of the lien. (§ 6. *Doughty vs. Devlin*, 1 E. D. S., 625; *Sullivan vs. Brewster*, 1 E. D. S., 689; *Pendleburg vs. Mead*, 1 E. D. S., 728; *Miller vs. Moore*, 1 E. D. S., 739.)

570. It is not necessary that the claim of the sub-contractor from the contractor should be actually due in order to acquire a lien. (§ 6. *Miller vs. Moore*, 1 E. D. S., 739, ante.)

571. Where a claimant took the note of the contractor, and subsequently before the note became due filed his notice, it was held that his taking the note did not deprive him of his right to acquire a lien, but the lien could not be enforced before the note became due. (*Althause vs. Warren*, 2 E. D. S., 657; *Teaz vs. Christie*, 2 E. D. S., 621-635; *Miller vs. Moore*, 1 E. D. S., 739.)

572. And where the claimant had indorsed and transferred the note to a third party who had obtained judgment thereon which remained unsatisfied and in full force, it was held that the claimant in a proceeding to foreclose the lien could not recover without showing that he had become re-invested with the title to the debt, and that the mere production of the note at the trial, and offering to give it up to be canceled was not sufficient. (*Teaz vs. Chrystie*, 2 E. D. S., 621; *do.*, 2 E. D. S., 635; *Smith vs. Coe*, 2 Hilt., 364.)

573. Taking a note or any security, or the recovery of a judgment for the debt, does not of itself prevent the lien from attaching by the subsequent filing of the notice. (*Althause vs. Warren*, 2 E. D. S., 657; *Teaz vs. Chrystie*, 1 E. D. S., 621.)

574. If after notice filed, it does not of itself invalidate the lien. (*Miller vs. Moore*, 1 E. D. S., 739.)

575. In any case however, the lien cannot be foreclosed by the claimant's notice until his debt is due. (*Althause vs. Warren*, 2 E. D. S., 657; *Teaz vs. Christie*, 2 E. D. S., 621; *Miller vs. Moore*, 1 E. D. S., 739.)

576. If other lienors or the owner foreclose before the debt is due, it must be proved and provided for in the judgment directing the sale of the property.

The Contract.

577. The contract is to govern in respect to the time when the moneys are to paid by the owner. He cannot be compelled to pay money to the claimant before it becomes payable according to the owner's agreement with the contractor. (*Sullivan vs. Decker*, 1 E. D. S., 699; *Ferguson vs. Burke*, 4 E. D. S., 760.)

578. All persons engaged by the contractor must, so far as they rely upon the owner or his house for security, be deemed to do so in subordination to the owner's contract. (*Doughty vs. Devlin*, 1 E. D. S., 625; *Randolph vs. Garvey*, 10 Abb., 179.)

In the former case the court, Woodruff, J., said :

"It is no violent or unfair presumption that when an owner has contracted with another to build a house, all sub-contractors and others furnishing materials to the contractor do so,

"with reference to such contract, in subordination to its provisions, and to the rights of the respective parties thereto, so far as they act in any reliance upon the owner or his house as a security under this law.

"Now, is it therefore any hardship to hold them constructively notified of its provisions, or bound to take notice at their peril. They know that they are not dealing with the owner; they know, or ought to know, upon what contingencies the owner will be bound to pay, and if they labor or furnish materials in any sense upon the credit of the owner or his house, they should do so upon the credit which the terms of the contract offer for their reliance." (*Doughty vs. Devlin*, 1 E. D. S., 625.)*

579. An owner cannot be required to pay a greater amount than the contract price or value of the work and materials furnished (when no specific contract is made) upon his land by his contractor. (§§1-6. *Sullivan vs. Decker*, 1 E. D. S., 669; *Ferguson vs. Burke*, 4 E. D. S., 760; *Doughty vs. Devlin*, 1 E. D. S., 625; *Carman vs. McIncrow*, 13 N. Y., 70; *Randolph vs. Garvey*, 10 Abb., 179.)

580. The effect of the statute is simply to take from the owner money actually owing by him upon his contract and apply it in payment of the labor and materials which sub-contractors or material-men have contributed towards the completion and performance of the same contract. (*Sullivan vs. Decker*, 1 E. D. S., 699; *Doughty vs. Devlin*, 1 E. D. S., 625; *Ferguson vs. Burke*, 4 E. D. S., 760; *Donaldson vs. Wood*, 22 Wend., 395; *Loonie vs. Hogan*, 9 N. Y., 435.)

581. Contracts under which liens may be acquired may be verbal or in writing, and may be implied as well as expressed. (*Knapp vs. Brown*, 11 Abb., N. S., 118; *Spencer vs. Barnett*, 35 N. Y., 94; *Hauptman vs. Catlin*, 3 E. D. S., 666, *affd.* 20 N. Y., 247; *Meehan vs. Williams*, 36 How., 73. See *post*, 620.)

582. As the evidence is to be the same in these cases as in ordinary action (§ 2) the rule that the best evidence must be produced which the circumstances permit must be regarded.

*A contractor who departs from his contract cannot recover at common law. (*Ellis vs. Hamlen*, 3 Taunt., 52.)

583. If there is a *written contract*, it is the best evidence and must be produced. Written evidence is always superior to oral. (1 *Phil. Ev.*, 575; 1 *Greenleaf Ev.*, §§ 87 to 90 and 463; *Chaffee vs. Cox*, 1 *Hilton*, 78.)

584. Although a contract is *not signed*, if there is evidence that it contains the terms of the contract, it may be regarded in preference to verbal testimony. (See *Gage vs. Jaqueth*, 1 *Lans.*, 207.)

585. Written rules of a company cannot be proven by parol, they should be produced. (*Chaffee vs. Cox*, 1 *Hilton*, 78.)

586. Plans, diagrams, maps, and written specifications are the best evidence when they exist as to what was understood between the parties, and hence they may be given in evidence when there is proof that they are connected with the transaction. (See *Smith vs. Coe*, 2 *Hilt.*, 365; *Gage vs. Jaqueth*, 1 *Lans.*, 207.)

587. As to the manner of proving bill of particulars. (See *France vs. McElhone*, 1 *Lansing*, 7; *Stroud vs. Tilton*, 3 *Keys*, 139.)

588. A contract with an owner for specific work stipulating no time of payment, nor any sum excepting that the labor was to be done by day's work, is an entire contract, and in such case requires the whole work to be done before the contractor can call for his payment. (*Cunningham vs. Jones*, 3 *E. D. S.*, 650; *White vs. Hewitt*, 1 *E. D. S.*, 395; *Neville vs. Frost*, 2 *E. D. S.*, 62; *Paige vs. Ott*, 5 *Denio*, 406.)

589. The amount to be recovered from the owner must be due the contractor from the owner. (*Smith vs. Ferris*, 1 *Daly*, 18; *Thompson vs. Yates*, 28 *How.*, 142; *Sullivan vs. Decker*, 1 *E. D. S.*, 689; *Miller vs. Moore*, 1 *E. D. S.*, 739; *Ferguson vs. Burke*, 4 *E. D. S.*, 760. See *ante*, 569.)

590. When the lienor is the employee of a sub-contractor, the amount which such lienor can recover from the owner cannot exceed the amount due from the contractor to such lienor. (*Sullivan vs. Decker*, 1 *E. D. S.*, 699.)

591. If payments are made by the owner in good faith according to the terms of his contract before the notice of lien is filed, they must be allowed to him in making up the aggregate

which he is liable to pay. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Miller vs. Moore*, 1 *E. D. S.*, 739; *McBride vs. Crawford*, 1 *E. D. S.*, 658; *Allen vs. Carman*, 1 *E. D. S.*, 692; *Carroll vs. Coughlin*, 3 *Daly*, 179; *post*, 592 and 593.)

592. Consequently, if the owner has paid up the contractor according to the terms of the contract, he cannot be made liable to any claimant on notice subsequently filed. (*Carman vs. McIncrow*, 13 *N. Y.*, 70; *Pike vs. Irwin*, 1 *Sand.*, 14; *Randolph vs. Garvey*, 10 *Abb.*, 179; *Kennedy vs. Paine*, 1 *E. D. S.*, 651; *Thompson vs. Yates*, 28 *How.*, 142; *Spaulding vs. King*, 1 *E. D. S.*, 717; *ante*, 591, *post*, 593.)

593. The owner or his property is not liable unless it appears that a payment is due the contractor from him. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Hauptman vs. Halsey*, 1 *E. D. S.*, 668; *Spaulding vs. King*, 1 *E. D. S.*, 717; *Pendleburg vs. Meade*, 1 *E. D. S.*, 728; *Miller vs. Moore*, 1 *E. D. S.*, 739; *Foster vs. Skidmore*, 1 *E. D. S.*, 719; *Sullivan vs. Brewster*, 1 *E. D. S.*, 689; *Cronks vs. Whittacker*, 1 *E. D. S.*, 647; *Sullivan vs. Decker*, 1 *E. D. S.*, 699; *Kennedy vs. Paine*, 1 *E. D. S.*, 651; *Ferguson vs. Burke*, 4 *E. D. S.*, 760; *Donaldson vs. Wood*, 22 *Wend.*, 395; *Loonie vs. Hogan*, 9 *N. Y.*, 435; *McBride vs. Crawford*, 1 *E. D. S.*, 658; *Allen vs. Carman*, 1 *E. D. S.*, 692; *Bailey vs. Johnson*, 1 *Daly*, 61; *Carman vs. McIncrow*, 13 *N. Y.*, 70; *Crystal vs. Flannelly*, 2 *E. D. S.*, 583; *Sinclair vs. Fitch*, 3 *E. D. S.*, 677; *ante*, 591, 592.)

594. If the owner pays in good faith before due under the terms of the contract, they will be allowed him. (*Schneider vs. Hobein*, 41 *How.*, 232; *Carroll vs. Coughlin*, 7 *Abb.*, *N. S.*, 72.)

595. If payments are made with intent thereby to defraud the sub-contractor or other party, to defeat the beneficial design of the statute, they will not be allowed. (*Lynch vs. Cushman*, 3 *E. D. S.*, 660; *Smith vs. Coe*, 2 *Hilt.*, 364; *Quimby vs. Sloan*, 2 *E. D. S.*, 594.)

596. A lienor is not concluded by a receipt in full from the contractor to the owner, nor by the contractor's statement, on examination in supplementary proceedings before the date of the lien, that the owner was not indebted to him. (*Smith vs. Coe*, 2 *Hilt.*, 264.)

597. In contracts for the purchase of property, real or personal (or for work to be performed), where there is no stipulation for credit or delay on either side, the performance and immediate payment of the price are each conditions of the other. (*Tipton vs. Feitner*, 20 *N. Y.*, 423; *Pollock vs. Ehle*, 2 *E. D. S.*, 541; *Cunningham vs. Jones*, 3 *E. D. S.*, 650.)

598. When the owner agreed with a contractor to erect a building by days' work without any other stipulation in respect to the price or terms of payment, it was held that the contract was entire, and that the contractor was not entitled to any payment from the owner until the work was complete; that a voluntary payment on account did not alter the effect of such a contract. (*Cunningham vs. Jones*, 3 *E. D. S.*, 650.)

599. A substantial compliance with the terms of the contract is a condition precedent to a recovery. (*Smith vs. Coe*, 2 *Hilt.*, 364; *affd.* 29 *N. Y.*, 666.)

600. Payment voluntarily made after notice filed does not impair the validity of the lien of any person except the one of the person so paid (§ 3), and then only to the extent of such payment. The filing of the notice is constructive notice to all persons of the claim of the lienor. (*Ante.*)

601. If the contractor makes a *bona fide* legal or equitable assignment of a payment due or coming due to him on the contract, a notice of lien subsequently filed will not reach it, and no judgment can be obtained against the owner for that amount. Such transfer does not violate § 13. (*Young Stone Co. vs. Wardens, &c.*, 61 *Barb.*, 489; see *Devlin vs. Mack*, 2 *Daly*, 94; see *ante.*)

602. Where the contractor has abandoned his contract, and the owner has completed it, the amount for which the owner would be liable to the sub-contractor would be the amount remaining unpaid on the contract, after deducting the amount expended in completing the work according to contract. (*Gillen vs. Hubbard*, 2 *Hilt.*, 303; *Smith vs. Ferris*, 1 *Daly*, 18.)

603. The owner may show what it cost to complete the work after it was abandoned by the contractor, as a measure of his damages. (*Smith vs. Ferris*, 1 *Daly*, 18; *Gillen vs. Hubbard*, 2 *Hilt.*, 303.)

604. A party aggrieved by a breach of contract must exert himself to reduce the damages caused thereby. (*Polk vs. Daly*, 14 *Abb., N. S.*, 156; *Dillon vs. Andrews*, 43 *N. Y.*, 237.)

605. A building contract containing the usual clauses, fixing the days for completing various parts of the work, and stipulating to the effect that any neglect to comply with the conditions of the contract, and finish the work as provided, shall be sufficient cause for the owner to claim damages, at the rate of ten dollars for each and every day's detention so caused, the owner is entitled to retain at that rate for delay occurring without his contributory negligence or consent, and a sub-contractor is bound by such agreement. (*O'Donnell vs. Rosenberg*, 14 *Abb., N. S.*, 59.)

606. Where a building contract specifies a sum to be deducted for any particular omission or failure in its performance by the contractor, the owner cannot in a proceeding by a sub-contractor, claim any greater rate or deduction by reason of the omission. (*Gillen vs. Hubbard*, 2 *Hilt.*, 303; *O'Donnell vs. Rosenberg*, 14 *Abb., N. S.*, 59.)

607. Where the contractor has abandoned his contract, any damages by the elements or by delay consequent thereon, will be a question of fact, as to whose fault it was, and who should bear it, the owner or the contractor.

608. If it was the contractor's fault it must be allowed against the sub-contractor, when he makes a claim. (*Gourdier vs. Thorp*, 1 *E. D. Smith*, 697; *Miller vs. Moore*, 1 *E. D. S.*, 739; *O'Donnell vs. Rosenberg*, 14 *Abb., N. S.*, 59.)

609. Where a party contracts to do work, and that the whole shall be completed to the satisfaction of an architect; in an action to recover the stipulated price, the contractor must aver and prove that the work was done to the entire satisfaction of such architect, or fraud or collusion in the withholding thereof. (*Barton vs. Herman*, 11 *Abb., N. S.*, 378.)

610. Where the building of a house is to be paid for in several installments on the production of the architect's certificate, as required by the contract, payment on some of them without such certificate, does not operate as a waiver of the architect's final certificate upon the completion of the work. (*Id.*)

611. Where a building contract made the architect's certificate of fulfillment a condition precedent to payment, it was held in an action upon the contract, that if the architect had unreasonably and in bad faith refused the certificate, the builder might recover upon giving other proof of performance. (*Thomas vs. Fleury*, 26 N. Y., 26.)

612. A stipulation in a written contract for building, &c., to the effect that in case any question arises under such contract in relation to the work, both as to the value of that added or deducted, the same shall be adjusted by an arbitrator, whether it name him or not, is not binding. (*Hurst vs. Litchfield*, 39 N. Y., 377; see *Smith vs. Brady*, 17 N. Y., 173.)

613. When the contract provides for an arbitrator, the offer to arbitrate must be in writing. (*Monteith vs. Evans*, 3 Sand., 65.)

614. Where a sealed covenant for the erection of a building provides for such alterations and additions as the owner may direct, the making of an alteration or addition is not such a consideration for a parol agreement by the owner modifying the sealed instrument as will make such parol agreement binding on the owner. (*Tinker vs. Geraghty*, 1 E. D. S., 687.) As to how such agreement may be altered by parol, see *Id.*

615. Where extra work is performed by a contractor or laborer, which is not in any way provided for or authorized in the contract or terms of employment, no lien can be acquired against the owner. (*Grogan vs. The Mayor*, 2 E. D. S., 693; *Foley vs. Alger*, 4 E. D. S., 719; *Smith vs. Coe*, 2 Hill., 364.)

616. In case the contractor departs from his contract so far that the owner would not be liable to him, still a personal judgment could be obtained in the proceeding against the contractor. (§ 9, *Grogan vs. The Mayor*, 2 E. D. S., 693.)

617. The contractor is personally liable to the lienor for the whole amount of his indebtedness, and the owner to the extent of the amount due by him to his contractor. (§ 9.)

618. In case of a collusive contract between the owner and contractor for a mere nominal sum for the purpose of preventing the attaching of liens by sub-contractors, laborers, &c., the owner or his property would be liable for the full and fair value

of such labor and materials the same as if no specific contract had been made, if the work was done by and in accordance with the directions of the owner or his agent. (§ 1.)

619. Under all previous laws, if the contractor abandoned his contract no lien could be acquired against the owner or his property by persons engaged by the contractor (2 *Crary's Prac.*, 622). Now, when the work has been abandoned by the contractor, those engaged by the contractor can obtain a lien to the extent of the full and fair value of the work and materials furnished (§§ 1 and 6), the same as if the work had been completed under the contract.

620. A mere implied contract on the part of the owner, which may be inferred from suffering improvements to be made upon his premises, to pay what the same may be worth, with no stipulation or agreement as to the price or character of the improvements, was not sufficient to enable a laborer or materialman employed by the builder to acquire a lien under the statute of 1851 (*Walker vs. Paine*, 2 *E. D. S.*, 662; *Berry vs. Weisse*, 2 *E. D. S.*, 662). As to who may be regarded as owner in executory contracts to purchase, contingent upon the erection of buildings. (See *ante*, 80 to 84.)

621. Where a party who was guardian of his infant daughter erected a house upon land owned by her, it was held that he could not as such guardian, without authority from a competent court, build a house upon the land of his ward, and charge the expense upon the ward, or make a building contract under which a lien upon the property could be sustained for such building. (*Copley vs. O'Neil*, 57 *Barb.*, 299; *Hassard vs. Rowe*, 11 *Barb.*, 22; *Putnam vs. Ritchie*, 6 *Paige*, 390.)

622. The lien is restricted to the funds due or to grow due upon the contract. Where unliquidated damages had accrued to the contractor by reason of the violation of the contract (to furnish materials) on the part of the owner, no lien can be acquired thereon by a sub-contractor or other person engaged by the contractor. (*Cunningham vs. Jones*, 3 *E. D. S.*, 650; *Linn vs. O'Hara*, 2 *E. D. S.*, 560; *Dennistoun vs. McAllister*, 4 *E. D. S.*, 729; *Nolan vs. Gardner*, 4 *E. D. S.*, 727; *Hoyt vs. Minor*, 7 *Hill*, 525.)

623. If the amount of the damages to the contractor were stipulated in the contract, there is no reason why a lien would not attach it, for it would be money accruing *under the contract*.

624. Where an owner fraudulently or by false representations procures work to be done, by reason whereof he becomes liable to his contractor in damages for the fraud thus practiced, the laborers and sub-contractors of the individual defrauded cannot have a lien on the damages which the contractor might recover from the owner for the fraud. (*Linn vs. O'Hara*, 2 E. D. S., 560.)

625. The contractor could acquire a lien against the owner on an implied contract in such case (*Id.*) and he could also in the cases mentioned (*ante*, 621.)

626. A contractor may make a valid agreement with the owner that he will not file liens under this statute, but he can make no *direct* agreement to that effect that will be binding upon his sub-contractors, without they being a party thereto. (*Poillon vs. The Mayor*, opinion of S. P. Nash, Referee, not reported, but in Court of Appeal Cases, January Term, 1872, vol. 215.)

627. Contracts sometimes contain the following clause: "That the parties of the second and third parts will not at any time suffer or permit any lien, attachment, or other incumbrance under any law of this State or otherwise, by any person or persons whomsoever, to be put or remain on the building or premises into or upon which any work is done or materials are furnished under this contract, for such work or materials, or by reason of any other claim or demand against the said party of the second part, and any such lien, attachment, or other incumbrance until it is removed, shall preclude any and all claims or demand for any payment whatever under or by virtue of this contract." (*Poillon vs. The Mayor*, *Id.*) It was contended in that case that as no money could become due to the contractors under it after liens were filed by the sub-contractors, that the sub-contractors who filed liens subsequent to the first one could not recover against the owner. It was finally decided on other questions.

628. An *indirect* contract may be made under recent decisions, by which no lien can be effectual against the property, to wit, by the owner uniting his contract with a lease to his contractor (see, to that effect, *Knapp vs. Brown*, 45 N. Y., 207; *Stuyvesant vs. Browning*, 1 Jones & S., 203; *Chapin vs. Stuart*, *ante*, p. 33). An executory contract to purchase contingent upon the erection of buildings is now ineffectual for that purpose, because § 14 declares the legal owner to be "the owner," and his vendee, the contractor, to be "the contractor." But this provision does not apply to executory contracts to lease contingent upon the erection of buildings (*Knapp vs. Brown*, 45 N. Y., 207, and cases last cited). The term of the lease may be long or short—a nominal rental for a thousand years or two weeks—the owner (lessor) to have the buildings before the term commences or after it ends—is all the same "in equity." A lien can only reach the contractor's (lessee's) interest. (*Id.*) *

* This proves the absurdity of the principle, or the lack of it, upon which these decisions are professed to be based.

The court did not profess to disregard the law—that the owner is the party for whom the building is erected. That is the principle upon which all previous cases were decided where there were executory contracts to convey and to advance money contingent upon the erection of buildings on the property (*ante*, 80, 81). In such case, a lien could be obtained against the vendee's interest, because the building is erected for the vendee, the vendor having no future interest in it any further than its value as security upon which he is to have a mortgage. Such advances were not regarded as money due or to grow due under a builder's contract, and therefore it could not be reached by a lien under the statute. Section 14 recognizes those decisions, and is intended for the purpose of allowing a *sub-contractor* to immediately reach money which the vendor is to advance to the vendee under such agreements.

As the law now is, under § 14 the owner (vendor) cannot be compelled to advance or pay any more to a *sub-contractor* than the value of the materials, &c., put upon his land by the vendee, his contractor (§ 1). And if the work is abandoned by the vendee or contractor, the *sub-contractor* can now (it was held he could not before this act—*Randolph vs. Garvey*, 10 Abb., 179) recover against the vendor to that extent only. (§§ 1, 6, 14.)

Previous to the law of 1844 (*Ch.* 220), there could be no lien on the *building or land in any case* under the statute. The lien only reached the moneys in the hands of the owner which were due or growing due his sub-contractor. (*Loonie vs. Hogan*, 9 N. Y., 435, and *McDermott vs. Palmer*, 11 Barb., p. 9; both arose under the law of 1830.)

In the cases mentioned in the text (and *ante*, 68 and 69), the court declared as a fact that the *tenant* was the owner, although the agreements expressly required

629. In such cases a lienor will not be allowed to show the extent or value of the erections or repairs to the lessor, or the real value of the rental, or to show that the erection or alteration was made in consideration of the letting of the premises; or to show that in consequence of such erection anything was due or to become due to the lessee from the owner. The contract is conclusive evidence of the relation of the parties (see *Knapp vs. Brown*, *Court of Appeals Cases at Law Institute Library*, vol. 171). And if the owner, who is entitled to the reversion, is made a *party* defendant in such case, he is entitled to judgment for costs. (*Id.*)

See *Story's Eq. Pl.*, § 193, as to parties in similar cases, to wit, foreclosure of mortgage.

630. The same questions may arise in these cases as in other actions as to what is a *variance* and what a *failure of proof* under §§ 169, 170, 171 of the *Code*, or, in other words, what is a matter of *form* and what a matter of *substance*. This relates, as well to the lien, notice and bill of particulars as to the pleadings. A substantial compliance with the statute is all that is necessary. (*Beals vs. Cong. B. J.*, 1 *E. D. S.*, 654; *Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

631. A variance is not deemed material unless it has actually misled the adverse party to his prejudice. (*Code*, § 169.)

as a condition precedent to the right to occupy the premises, that the buildings should be erected by the lessee for the lessor, and the same was erected for the lessor, who then became the owner of the buildings to the same extent as he was of the land upon which it stood. The lessee was afterwards only to have the use of them both for a short period, subject to the usual conditions in a lease.

The court assumed and declared as a *fac* (contrary to the *actual fact*), that the building was *not* erected for the lessor, while the agreement expressly required that it should be so erected for the lessor, and that he should become the owner before the lessee had the right to their use.

A court of last resort has the physical power to declare the non-existence of any *actual, undisputed fact*, and then decide accordingly, and the aggrieved party has no remedy.

The requirements of justice and right show that in similar cases there should be a distinction between executory contracts to lease contingent upon repairs, &c., and executed leases and repairs that are only *permitted* to be made by the lessee (See *Muldoon vs. Pitt*, 4 *Daly*, 105.)

The following have been held as immaterial variances under the Code:

632. Statement of delivery by plaintiff—proof of delivery by plaintiff's agent. (*Richards vs. Westcott*, 2 *Bosw.*, 590.)

633. Statement that note made by Orrin North—proof that it was made by two persons trading as Orrin North. (*Bk. of C. vs. Woods*, 28 *N. Y.*, 545.)

634. Statement promise to pay a specified compensation—proof promise to pay what reasonably worth. (*Scott vs. Lilienthal*, 9 *Bos.*, 224; *Patterson vs. Patterson*, 1 *Abb.*, *N. S.*, 262.)

635. Statement of sole liability—proof of joint undertaking. (*Carter vs. Hope*, 10 *Barb.*, 180.)

636. Statement of an absolute promise—proof of a conditional promise. (*Hart vs. Hudson*, 6 *Duer*, 294.)

637. Statement of bill payable to order of A—proof of a bill payable to the order of B. (*Clafin vs. Griffin*, 8 *Bos.*, 689.)

638. Statement of delivery at 59 Broadway—proof of delivery in Canal street. (*Neustadt vs. Adams*, 5 *Duer*, 43.)

639. Statement that property belonged to plaintiff—proof that he held it as factor. (*Gorman vs. Casey*, 1 *Abb.*, 285.)

Statement that defendant was in possession of the premises in right of his wife—proof that he was in possession in his own right. (*Rose vs. Bell*, 38 *Barb.*, 25.)

640. Statement that defendant is owner of all—proof that he is owner of part only. (*Van Rensselaer vs. Jones*, 2 *Barb.*, 643; *Schoop vs. Clarke*, 1 *Keyes*, 181.)

641. A variance between the proofs and bill of particulars is not material unless it mislead. (*Code*, § 169; *Seaman vs. Low*, 4 *Bosw.*, 338.) A referee may permit a new bill of particulars to be substituted in place of one attached to the complaint. (*Melvin vs. Wood*, 3 *Keyes*, 533.)

642. Where a contractor charged in his bill of particulars four dollars per day for work, and on the trial it appeared that he had the work done for \$3.50—that the fifty cents per day were his profits—it was held that he could recover that sum for his services, and that it was no departure from his bill of particulars. (*Anderson vs. Dillaye*, 47 *N. Y.*, 678.)

643. Where a contract has been by mutual consent so substantially and materially departed from that it is impossible from the evidence to ascertain the extent of the alterations in the contract which was originally intended to control, the case should be regarded as one erected under a general employment, and the owner to pay what the work and materials are reasonably worth. (*Smith vs. Coe*, 2 *Hilt.*, 364; *affd.* 29 *N. Y.*, 666.)

644. In regard to variances, it is provided: "That no variance " as to the persons named as contractor, owner or debtor, in " the lien, notice or bill of particulars, or statement of claim, or " in any pleading, shall impair or affect the rights of the " claimants as hereinafter defined, and every party shall have " relief according to the rights of the parties as they shall appear in evidence" (§ 2*).

645. If it appears by the evidence on the trial that a person named as owner, contractor or debtor in the lien or notice or bill of particulars, or any pleading, is not personally liable under § 9, judgment may be given in his favor, but the rights of the lienor will not be prejudiced thereby as against the property or any proper person (§ 2, *post*, 657). When the proper person can be ascertained he may be brought in as a party. (See *ante*.)

646. If, on the trial, it appears that a defendant is not owner, as alleged, he may still be personally liable as contractor. (§§ 2 and 9.)

647. Where a claimant alleged in his notice of lien and in his complaint a joint contract with the owner and a contractor, and no joint contract was proved but an individual one by the owner, the court held that the owner could not avail himself of it; that the lien and judgment was valid against him. (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284; *Hauptman vs. Catlin*, 3 *E. D. S.*, 666, and *ante*.)

648. Where a notice of lien was filed in the individual name of one of a firm, and he individually commenced proceedings

* Under the Law of 1851, where a lienor's notice was for work done for the contractor as debtor, he could not recover under it for work done for the owner (*Hauptman vs. Halsey*, 1 *E. D. S.*, 668). But he could recover against the owner on another notice filed against him as debtor. (*Smith vs. Ferris*, 1 *Daly*, 18). See *ante*, 159, note.

to foreclose, and it appeared by the evidence that the materials for which the claim was made were furnished by a firm of which he was a member, and that his copartners had not, until after the filing of the notice and commencement of the proceedings, relinquished their claim, it was held that the claimant could not recover. (*Hubbell vs. Schreyer*, 14 *Abb.*, N. S., 284.)

649. The notice should be according to the facts, but may be according to the legal effect. (*Ante.*)

If it is untrue in any material statement, excepting those mentioned in § 2, it is of no effect. (*Hubbell vs. Schreyer*, 14 *Abb.*, N. S., 284.)

As to what are material statements therein, see *antè*, "Form of Notice."

650. Where it appears that the work was done on some other building than that on the lot which is described in the notice of lien, there is a failure of proof, and judgment must be for the defendant. (*Cronkrite vs. Thomson*, 1 *E. D. S.*, 661 ; *Randolph vs. Leary*, 3 *E. D. S.*, 637 ; *Donnelly vs. Libby*, 1 *Sweeny*, 259.)

651. As to what is a material variance under the Code, and the remedy as to how and when the objection should be made that the case proved varies from that stated in the complaint, see *Voorhies' Code*, §§ 171, 169, and notes.

252. Amendments may be made, the same as in other cases, under the Code.

The notice of lien cannot be amended. (*Beals vs. Cong. B. J.*, 1 *E. D. S.*, 654 ; *Conklin vs. Wood*, 3 *E. D. S.*, 662 ; *Hallahan vs. Herbert*, 2 *Daly*, 253.) Nor can the verification to the notice of lien. (*Id.*) A referee may permit an amendment of bill of particulars and may permit a new bill of particulars. (*Melvin vs. Wood*, 3 *Keyes*, 533.)

653. If the allegations in the pleadings or claims of any of the parties are illegal or improper, an objection to the evidence offered under them should be made, the same as in an ordinary action, and if it is admitted as evidence, an exception taken if they are to be subsequently reviewed on appeal.

654. A lien of this kind is to be regarded in the proceedings for its enforcement the same as a lien by judgment, being

created wholly by statute. (*Meyers vs. Seebald*, 11 *Abb.*, *N. S.*, 326 ; *O'Donnell vs. Rosenberg*, 14 *Abb.*, *N. S.*, 59 ; *Brinkerhoff vs. Board of Education*, 6 *Abb.*, *N. S.*, 418.)

655. A receiver will not therefore be appointed in these proceedings (*Meyers vs. Seebald*, 11 *Abb.*, *N. S.*, 326). It was formerly held otherwise. (*Webb vs. Van Zandt*, 16 *Abb.*, *N. S.*, 314 ; *Porschke vs. Kedenberg*, 6 *Abb.*, *N. S.*, 172.)

656. An injunction will be granted in certain cases. (*Quinn vs. The Mayor*, 2 *E. D. S.*, 558 ; *Paine vs. Bonney*, 4 *E. D. S.*, 734.)

657. The filing of a notice of lien alleging the performance of work in pursuance of an agreement with a contractor, and in conformity with a contract between the latter and an owner, will not absolutely estop the claimant from prosecuting an ordinary personal action or a proceeding against the owner, and averring therein a direct employment of the plaintiff by the owner. (*Cremien vs. Byrnes*, 4 *E. D. S.*, 756 ; *Smith vs. Ferris*, 1 *Doly*, 18.)

658. The pendency of these proceedings would be a good defense in an action under the Code between the same parties after proceedings are commenced to foreclose the lien, whenever a personal judgment therein may be rendered for such claim (*Ogden vs. Bodle*, 2 *Duer*, 611) ; and an adjudication in these proceedings upon the merits is a bar to any other action. (*Schaettler vs. Gardiner*, 41 *How.*, 243.)

659. If the contractor sues the owner in an ordinary action on the contract, if there are any liens filed against the property by those employed under the contractor, it will be not a good defense to the action to the extent of such liens so filed (*Gridley vs. Rowland*, 1 *E. D. S.*, 670 ; *Mosey vs. Larkin*, 2 *do.*, 540 ; *Pollock vs. Ehle*, *do.*, 541 ; *Westervelt vs. Levy*, 2 *Duer* 454. See *ante*, 20, *post*, 779). The owner must take proceedings under this statute, or he may, before action, take an assignment of the claims, and set them up as a counter-claim against the contractor.

660. By these proceedings the claimant waives all the incidents of an action under the Code, to wit: Arrest and Bail, Claim and Delivery of personal property, Attachment against

property, and all other provisional remedies (*except an injunction, post, 651*), allowed before judgment. *

661. When these proceedings and an action in which a personal judgment may be rendered are both pending at the same time, a claimant may elect which he will pursue. (*Webb vs. Van Zandt, 16 Abb., 314.*)

CHAPTER VII.

THE JUDGMENT.

662. It is provided that, "the court shall proceed without regard to matters of form, and judgment shall be rendered according to the equity and justice of the claims of the respective parties" (§ 5). And, "in cases where they appear and plead, the court may determine the rights of all parties and the amounts due to each, and by whom to be paid (§ 7). * * "And such judgment or decree shall be made thereon as to the rights and equities of the several parties *among themselves*, and as against any owner as may be just (§ 7). "And every party shall have relief according to the rights of the parties as they shall appear in evidence." (§2.)

663. When the proceeding is commenced by the owner on the return of the notice, and proof of due service on the parties, none of them appearing, an order may be entered, as at Special Term, exempting the property from the liens, without any other proceeding. (*Carroll vs. Coughlin, 7 Abb., N. S., 72.*)

664. On the trial of *all the issues*, the court or referee must find the facts and conclusions of law separately, the same as in other cases (*Code, § 267, 272, Rule 39.*) It must appear by the findings, that the act has been complied with in every particular required by the statute, in order to make a valid lien, and such facts must be set forth in the affirmative or in the negative, as the case may be, so they can be fairly reviewed on appeal. They should be as full and as specific as they are required to be alleged in the complaint (*ante*). And should be full as to each party as between themselves, particularly if they have or claim different interests. (*Code, § 274.*)

665. Where successive liens are filed by the different persons allowed by § 1, the report and judgment should provide that the amount due the laborer, cartman, material man and sub-contractor should be first paid before that of the contractor for his services or materials. (§ 3.)

666. Where several buildings are done under one contract, the report and judgment should particularly provide that each should have a priority on the particular building where his labor is performed or his material used. (§ 3.)

667. In case of persons standing in equal degrees as co-laborers, or various persons furnishing materials, the report and judgment should specify that these should be paid by priority, according to the date of filing their notice of lien. (§ 3, *Kaylor vs. O'Connor*, 1 E. D. S., 672; *Schaefer vs. Reilly*, 50 N. Y., 61.)

668. Where several lien notices are filed for the same demand, as in case of a contractor including claims for workmen and materials, to whom and for which he is indebted, and a lien by the workmen and material-men, the findings and judgment must provide for the proper payments, so that under the liens filed double payments shall not be required. (§ 3.)

669. The preference given to the laborer, cartman, material-man, and sub-contractor, over the contractor, applies only to those who are engaged by that *special contractor*, and not over any other contractor who is engaged by the *owner*. This is the intent of § 3.

670. Where liens exist against several parcels of land which have passed to several owners, the findings may apportion the burden among the different grantees, according to the equity of the case and consistent with a due enforcement of the liens. (§ 3. *Kaylor vs. O'Connor*, 1 E. D. S., 672; *Livingston vs. Miller*, 16 Abb., 371; *McAuley vs. Mildrum*, 1 Daly, 396; *Paine vs. Bonney*, 4 E. D. S., 734.)

671. The right to the Marshaling of Securities and of Assets remains as in other equitable actions, excepting as they are regulated, directed, and provided for in § 3. In these proceedings they are particularly applicable and valuable to a lienor, for in many cases where the securities are properly marshalled

a lienor may be enabled to recover the entire amount of his claim, while, otherwise, it would prove worthless.* (See *ante*, 51, 53, 119, 121.)

672. Where there is a lien on several houses, and any of them have afterwards been conveyed to different persons, the lien should be enforced by a judgment directing the sale first of those last conveyed, and thus have the lien satisfied out of the property in a reversed order of the transfers. (*Story's Equity Jurisp.*, § 1233 b.; *Tower vs. White*, 10 *Paige*, 395; *Rathbone vs. Clark*, 9 *Paige*, 648; *Crafts vs. Aspinwall*, 2 *N. Y.*, 289; *Welch vs. James*, 22 *How.*, 474; *Paine vs. Bonney*, 4 *E. D. S.*, 734; *Wood vs. Spalding*, 45 *Barb.*, 602.)

673. If the contracting owner holds any of them, the one he holds must be first sold, and if the proceeds are not sufficient to satisfy the lien, then the others may be resorted to in the order above stated. (*Id.*)

674. When there are several distinct lots or parcels to be sold, unless the judgment directs *how* the same is to be sold, the sheriff can sell them altogether, or in such lots or parcels as he thinks will bring the best price. (*Rule 75, see Cunnigham vs. Cassidy*, 17 *N. Y.*, 276.)

* The general principles upon which the Marshaling of Securities is founded is that where there are several creditors, having a common debtor, who has several funds, all of which can be reached by one creditor, and only a part of the funds by the other creditors, the latter have a right in equity to compel the one creditor to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of all parties, whenever it will not touch upon the rights or operate to the prejudice of the party entitled to the double fund. Thus, if A has a mortgage upon two different estates for the same debt, and B has a mortgage upon only one of the estates for another debt, B has a right to throw A in the first instance for satisfaction upon the security which he, B, cannot touch, at least, where it will not prejudice the rights or improperly control his remedies (*Story's Eq. Jurisp.*, § 633, 634; *Willard's Eq. Jurisp.*, p. 338, and authorities there cited; *Aldrich vs. Cooper*, in 2 *White & Tudor's Leading Cases in Equity*, p. 66, &c). This principle applies to mortgages, judgments, or any other security which creates a lien in favor of the creditor. (*Id.*)

Marshaling is not confined, however, to liens on property, it extends to *personal* securities. When a person has a lien on property as well as other personal security, he may be compelled to resort to the personal security before he is allowed to proceed against the property. (*Harris vs. Fly*, 7 *Paige*, 422; *Hunt vs. Townsend*, 4 *Sand. Ch.*, 510; *Story's Eq. Jurisp.*, § 633.)

Personal Judgment.

675. The findings should also show who are personally liable and to whom, and the extent of such personal liability and the amount, if any, due (or when it is to become due) from the owner to the contractor and the amount due from the contractor or debtor to the lienor.

676. The contractor (debtor) is personally liable to the lienor for the whole amount of his indebtedness, and the owner is personally liable to the lienor to the extent of the amount due by him to *his* contractor (§ 9).*

677. The term "personally liable" and "personal judgment," as used in the act (§ 9), means general liability of property, and general judgment against property, to be enforced against property only (§ 9), and does not mean a judgment against the person, as that term is usually understood.

678. Contractor means any and every person expressly or impliedly employed by the owner, and sub-contractor means any and every person expressly or impliedly employed by any contractor or person other than the owner; the sub-contractor stands in the relation of contractor to any and every person employed by him; therefore, if the contractor has paid up the

* Under the Lien Laws relating to New York city, prior to the Act of 1851, the owner was *personally* liable to the lienor for the amount of the judgment recovered by the lienor, provided the same did not exceed the amount due from the owner to the contractor. (*Laws*, 1830, *Ch.* 330, § 4; *Laws*, 1844, *Ch.* 220, § 10.)

The Act of 1851 (§ 7) was not so definite on that point as the former laws, and the court almost immediately impliedly held that the owner was not personally liable to the lienor by virtue of the act, unless he was liable by *direct* contract; therefore, it was afterwards held that a *sub-contractor* could not obtain a personal judgment against an owner. (*Crystal vs. Flannelly*, 2 *E. D. S.*, 588; *Quimby vs. Sloan*, 2 *do.*, 594; *Walker vs. Paine*, 2 *E. D. S.*, 662; *Sinclair vs. Fitch*, 3 *E. D. S.*, 677; *Cox vs. Broderick*, 4 *E. D. S.*, 721; *Dennistoun vs. McAllister*, 4 *E. D. S.*, 729; *Grogan vs. McMahon*, 4 *do.*, 754.)

The court seemed to think that the Law of 1855 had affirmed their former holding on that question (*Cox vs. Broderick*, 4 *E. D. S.*, 721). But even under the Law of 1855 such a holding might well be questioned, particularly when we consider what the former laws had been on that subject.

The discussion of this question is only important in considering the effect which those decisions may have in construing similar statutes in this State. The Act of 1862, relating to the counties of Kings and Queens, is precisely like the Act of 1851-55 in that respect.

sub-contractor, no recovery can be had against the owner by any person to whom the sub-contractor is indebted, notwithstanding the owner may still owe a contractor, nor can a personal judgment be rendered against a contractor when he owes the sub-contractor nothing (*Grogan vs. McMahon*, 4 E. D. S., 754), and in any event he cannot be made liable, neither can the owner be made liable only to the amount *due* from the contractor to *his* sub-contractor.

679. A person engaged by a sub-contractor may recover a personal judgment against such sub-contractor for the amount actually due him from such sub-contractor, and a personal judgment against a contractor for the amount thereof if the same is due the sub-contractor from a contractor, and a judgment against the owner for the same amount, providing it does not exceed the amount due from such owner to his contractor—the person that engaged the sub-contractor. The same rule prevails through any number of series of contractors, sub-contractors, employees of sub-contractors, and persons under them.

680. “Where the creditor of the contractor seeks to enforce a lien, the amount due from *the contractor* to such creditor is not necessarily the measure of the lien to be enforced, for so much may not be due from the owner. Nor is the amount due from *the owner* to the contractor such measure, for so much may not be due to the claimant. Conflicting questions at once arise affecting the owners, the contractors and the claimant directly, and which *ex-necessitate* must control the judgment which the court shall give.” (*Woodruff, J., in Sullivan vs. Decker*, 1 E. D. S., 699.)

681. A lienor cannot in these proceedings recover a *personal judgment* against his contractor for a *larger amount* than his lien names, because it is a special mode of applying a special remedy. No judgment can be recovered larger than the amount claimed in the lien, with interest thereon and costs of foreclosure. (*Prot. U. vs. Nixon*, 1 E. D. S., 671; *Dunning vs. Clark*, 2 E. D. S., 535, and note; *Eagleson vs. Clark*, 2 E. D. S., 644; *Althause vs. Warren*, 2 E. D. S., 657; *Williamson vs. Hendricks*, 10 Abb., 98.)

682. Where, however, the court has obtained *jurisdiction of the contract* by the filing of a proper notice, a personal judgment may be rendered for an amount equal to the *amount claimed in the notice*, although the lien is only valid *as such* for a smaller amount. (*Spencer vs. Barnett*, 35 N. Y., 94; *Hubbell vs. Schreyer*, 14 Abb., N. S., 284.)

683. If no lien has ever been acquired or created, or if the notice is defective, a personal judgment cannot be rendered against the owner in favor of his contractor (*Quimby vs. Sloan*, 2 E. D. S., 594; *Beals vs. Cong. B. J.*, 1 E. D. S., 654; *Cronkrite vs. Thomson*, 1 E. D. S., 661; *Conklin vs. Wood*, 3 E. D. S., 662; *Dennistoun vs. McAllister*, 4 E. D. S., 729; *Hallahan vs. Herbert*, 2 Daly, 253; *Donnelly vs. Libby*, 1 Sweeny, 259; *Hubbell vs. Schreyer*, 14 Abb., N. S., 284; *Barton vs. Herman*, 3 Daly, 320). Nor in favor of the *sub-contractor* against the contractor. (*Id.*)

684. A personal judgment cannot be obtained by a sub-contractor against an owner or contractor unless it is proved or conceded that a *lien* was obtained upon the premises for the work or materials for the amount or value of which a personal judgment is asked against the contractor. (*Donnelly vs. Libby*, 1 Sweeny, 259; *Barton vs. Herman*, 3 Daly, 320; *Hubbell vs. Schreyer*, 14 Abb., N. S., 284; *Dennistoun vs. McAllister*, 4 E. D. S., 729; *Cox vs. Broderick, do.*, 721.)

685. A personal judgment may be rendered against an *equitable owner* when he is made a party defendant with the legal owner. (*Hallahan vs. Herbert*, 11 Abb., N. S., 326.)

685. In order to obtain a personal judgment against the contractor only, the claimant must go further than show that which would entitle him to a judgment in an ordinary action; he must show that such demand arises upon the performance of work pursuant to an agreement between the claimant and the contractor, and in conformity with a contract between the owner and the contractor. (*Dennistoun vs. McAllister*, 4 E. D. S., 729.)

686. Where a personal judgment is rendered against a contractor in favor of a sub-contractor, the findings must still show the same as would be necessary if it were against the owner. (*Dennistoun vs. McAllister*, 4 E. D. Smith, 729.)

687. The findings must recite all the facts necessary to show that a lien was acquired, and show that the only reason why the judgment should be in favor of the owner is because there was nothing due or to become due from the owner to the contractor (whatever that cause may be) when the notice was filed.

688. Judgment may be given in *favor* of the owner against a *sub-contractor*, and the sub-contractor may in such case *recover* a personal judgment against the contractor for the amount of his indebtedness to the sub-contractor. (*Grogan vs. The Mayor*, 2 E. D. S., 693; *Grogan vs. McMahon*, 4 E. D. S., 754.)

689. If the owner has *bona fide* conveyed the property before the notice of lien was filed, no personal judgment can be obtained against the contractor, because no lien was acquired. (*Quimby vs. Sloan*, 2 E. D. S., 594, and *ante*, 683, 684.)

690. If more than one year has elapsed since the filing of the notice of lien, it must affirmatively appear by the findings, if a sale of the property is directed, that such lien has been continued by order of the court. (*O'Donnell vs. Rosenberg*, 14 Abb., N. S., 59; *Barton vs. Herman*, 3 Daly, 320; *Schaettler vs. Gardiner*, 41 How., 243; *Mushlitt vs. Silverman*, 50 N. Y., 360.)

691. If the findings do not show this, a judgment entered on them may be set aside on motion (*Barton vs. Herman*, 3 Daly, 320; *Grant vs. Vandercook*, 57 Barb., 165.) Or a new trial will be granted on appeal. (*O'Donnell vs. Rosenberg*, 14 Abb., N. S., 59; *Schaettler vs. Gardiner*, 47 N. Y., 404.)

692. The judgment must be *perfected* within the year or the lien must be continued. (*Id.*; *Freeman vs. Arment*, 5 Leg. Ob., 381.)

693. Where proceedings are pending to foreclose the lien, and the lien has expired by limitation, the claimant may still proceed and have a personal judgment in the proceedings against those *liable by contract*, the same as if the lien had not expired. (*Barton vs. Herman*, 8 Abb., N. S., 399; *Schaettler vs. Gardiner*, 41 How., 243; *Schaettler vs. Gardiner*, 47 N. Y., 404.) *

* Under the general lien law, the Supreme Court have held that after a lien has expired by limitation no personal judgment can be obtained against any person, even though he is liable by contract. (*Grant vs. Vandercook*, 57 Barb., 165;

694. Whether, after a lien has expired while the proceedings are pending, a *personal judgment* may still be rendered against a person who is *not directly liable* by contract, to wit, a personal judgment in favor of a sub-contractor against the owner for the amount due from him to the contractor at the time the notice was filed, is still an unsettled question. In *Schaettler vs. Gardiner*, 41 *How.*, 243, a deposit was made by the contractor, and hence this question could not properly arise, but the court said the action should be dismissed as to the owner after the lien had expired. In *O'Donnell vs. Rosenberg* (14 *Abb.*, *N. S.*, 59), a claimant who had only proved his claim before the referee, and had not continued his lien, and the time expired before the referee's report was made, it was held that the proceedings ceased as to him. But in *Barton vs. Herman* (3 *Daly*, 320, and 8 *Abb.*, *N. S.*, 399), in a well considered opinion, it was held that the lien only ceased as against the specific property, and that as to all other remedies in the proceedings they remained the same.

695. The whole course of decisions on these statutes from the first show that the courts are inclined to strictly construe them, and hence it is probable they will hold that a sub-contractor or other person to whom the owner is not personally liable by contract cannot obtain a personal judgment against the owner after the lien has expired. If such claimant wishes to hold the owner personally liable, he must have his lien continued within the time and manner provided by the statute. (*Mushlitt vs. Silverman*, 50 *N. Y.*, 360; *Huxford vs. Bogardus*, 40 *How.*, 94.)

696. Therefore, where no claim is made against the owner as being liable by personal contract, if the lien expires, the proceeding as to him abates and should be dismissed (*Schaettler vs. Gardiner*, 41 *How.*, 243) with costs. (*Huxford vs. Bogardus*, 40 *How.*, 94.)

Huxford vs. Bogardus, 40 *How.*, 94.) The decisions cited in the text are founded upon principle, and will ultimately prevail. The principle upon which they are based is recognized in the Court of Appeals, where it is held that although the lien is not valid as such, only to a limited amount, a personal judgment may be rendered for a larger amount due on the contract. (*Spencer vs. Barnett*, 35 *N. Y.*, 94.)

697. The judgment, although only personal, must show whether the lien has been continued or not, if it has been more than one year since the lien was filed. (*O'Donnell vs. Rosenberg*, 14 *Abb.*, 59.)

698. After a lien ceases by limitation before any proceedings, it cannot be made the means of obtaining a personal judgment in these proceedings. (*Schaettler vs. Gardiner*, 41 *How.*, 243; *Barton vs. Herman*, 8 *Abb.*, *N. S.*, 399; *Grant vs. Vanderwols*, 57 *Barb.*, 299; *Huxford vs. Bogardus*, 40 *How.*, 94.)

699. After the lien runs out by limitation before any proceedings, the only mode of enforcing the claim is by ordinary action against the debtor. (*Barton vs. Hermann*, 8 *Abb.*, *N. S.*, 399.)

700. If a set-off is established at the trial, exceeding the plaintiff's demand so established, judgment for the defendant, even if a contractor, must be given for the excess. Or if it appear that the *defendants* are entitled to any other affirmative relief, *as between themselves*, judgment must be given accordingly. (§ 7; *Code*, §§ 263, 274; *Grogan vs. McMahon*, 4 *E. D. S.*, 754; *Grogan vs. Raphael*, 6 *Abb.*, 306.)

701. The findings should not only show the amounts due from the owner to the contractor, and if it is not due, when it will become due, but they must go further and show the amount *as a lien*, and should particularly describe the premises upon which it is found there is a lien, and specify when each of them accrued by the filing of the notice, and how the proceeds of the sale of the property shall be distributed. (§ 9.)

702. A copy of the notices filed should be attached to the findings, so that any question that may arise as to their construction or sufficiency as to form or legal effect can be disposed of whenever it comes before the court.

703. The judgment will relate back, and take effect, as an incumbrance, as a lien at the time the notice of lien was filed. (*Althause vs. Warren*, 2 *E. D. S.*, 657; *Randolph vs. Leary*, 3 *E. D. S.*, 637; *Smith vs. Corey*, 3 *E. D. S.*, 642; *Paine vs. Bonney*, 4 *E. D. S.*, 734; *Schafer vs. Reilly*, 50 *N. Y.*, 61; *Meehan vs. Williams*, 36 *How.*, 73.)

704. Where it appears in evidence that the interest of the contracting owner was *less* at the time of the work than it was at the time the notice was actually filed, the judgment should provide for the sale of his interest *at the time of the work*, and should specify such time instead of the time of the filing of the notice.

705. This latter rule does not apply to the subsequently acquired rights of one who is an *equitable owner* at the time the contract for the work was made, or who was such at the time and by whose authority the work, &c., was done. (*Cox vs. Broderick*, 4 E. D. S., 721 ; *Rollin vs. Cross*, 45 N. Y., 766.)

706. When the tenant is held to be the owner and his interest in the property has expired after notice filed, but before judgment, it should still be in form as against his interest in the property at the time the notice was filed.

707. In case money has been deposited and the lien discharged as against the property under § 10, *subd.* 2, a special judgment against the property would be erroneous. (*Dunning vs. Clark*, 2 E. D. S., 535.) Therefore the findings should state the fact of such deposit and discharge as aforesaid, and show that the money is still in the hands of the county clerk, and direct how the same is to be distributed among the claimants. (§ 9.)

708. When the summons and complaint and notice has been served on a subsequent lienor, pursuant to §§ 4 and 5, and he does not appear in the matter, the findings should show service of the papers and that he did not appear but made default, and that he is thereby barred from all lien and interest in the matter in controversy *in rem.* in said proceeding.

709. When all the issues are referred the referee's report should dispose of the question of costs between the parties. (*Barker vs. White*, 3 *Keyes*, 617.)

710. When, on a reference to try and determine *all* the rights of the parties, on the coming in of such report, it is regarded the same as in any other case where all the issues are referred. No notice of filing, no application for confirmation, is necessary. (*Schacttler vs. Gardiner*, 41 *How.*, 243 ; *Hubbel vs. Schreyer*, 14 *Abb.*, N. S., 284 ; *Code*, § 272.)

711. Exceptions to the referee's report, in such cases, are not heard at Special Term, in the first instance, under rule 39, but are heard at General Term. (*Id.*)

712. When the referee is to report on one or more of the questions of fact (and not on the *whole* issues), the report must contain his findings of fact and *should* contain his opinion of the law of the matter. (*Scott vs. Williams*, 14 Abb., 70.)*

713. When the report is upon the facts only it is a special report, and has the effect of a special verdict (*Code*, § 272), leaving the judgment to the court. (*Code*, § 260; see *Grogan vs. The Mayor*, 2 E. D. S., 693. See *Westervelt vs. Levy*, 2 Duer, 354.)

714. It must be filed with the testimony of the witnesses, signed by them, and a written notice of the filing thereof given to the parties interested (*Rule 39*). Service of a copy of such report is not required. (2 *Van Santvoord's Eq. Prac.*, 91.)

715. Unless exceptions are filed and served within eight days after the service of notice of filing, the report becomes absolute as of course, and stands in all things confirmed. (*Rule 39*.)

716. The exceptions to such report need only be to the findings of fact, as the court is not bound to follow the referee's opinion or conclusions of law, and may give an opposite judgment from that which the referee recommends.

717. But the *exceptions* are usually to both findings of fact and conclusions of law, the same as on a trial of all the issues.

718. If exceptions are filed and served within the proper

* Section 272 of the Code, and the third paragraph of Rule 39, only *requires* the report to contain the findings of fact and *conclusions of law* where the trial is upon *all the issues*.

When a *specific question* is referred to a referee, he has only the power that a master in chancery had under the former practice (*Graves vs. Blanchard*, 4 How., 303). When the *whole issue* is referred to him, he takes the place of a judge at Special Term. (*Id.*; *Code*, §§ 272, 348.)

It may be regarded as *necessary* that the referee's report, *though special*, should state his conclusions of law (or his opinion of the law) on the facts found by him, because now, if no exceptions are filed to his report when it is special, an order can be entered as of course confirming the report in all things. (*Rule 39* and *post* 715 and 720, *note*.) And judgment can then be entered thereon in accordance therewith at the same time, without any other notice. This cannot be properly done if there are to be conclusions of law found upon the facts as reported.

time, they may be brought to a hearing at any Special Term thereafter, on notice, under Rule 46, to the parties filing them. (*Rule 39.*)

(719. The exceptions are noticed for argument and are heard at a Special Term at the Chambers of the court in which the action is pending. (*Id.*)

720. Such motion is an enumerated one, arising on special verdict (*Rule 47*), and a copy of the report must be served on the opposite party at least eight days before the time of argument. (*Rule 49.*) This time may be shorter under Rule 46.*

721. On such hearing the court cannot hear other testimony on the same point which has been referred,† but may send it back to the referee for a further report, and the order need not specify the points upon which a further report is desired. (*Union Bank vs. Mott*, 13 *Abb.*, 247.)

722. When, after exceptions, a decision is given by the judge on the referee's report on a question of fact, he must state his conclusions of law upon the facts, or if they are stated in the report, a mere confirmation is sufficient, and if he has taken other testimony, his decision must contain the further or other findings of fact. (*Code*, § 267; *Spencer vs. Barnett*, 35 *N. Y.*, 94.)

723. When any specific question of fact is tried by a jury other than on the whole issue, the proceedings before the court,

* Previous to the Rules of 1858 (32 and 33) it was necessary, in all cases where the reference was not upon *all the issues*, to apply to the court at Special Term, on motion, on notice, for a confirmation of the referee's report and judgment thereon (*Griffin vs. State*, 5 *How.*, 205; *Belmont vs. Smith*, 1 *Duer*, 675; *Bante vs. Brady*, 7 *How.*, 216). The rules, as amended in 1858 (32 and 33), for the first time, provided for the filing of the report and notice thereof, and exceptions, &c., the same in substance and effect as the present rules.

† In one case (*Gregory vs. Campbell*, 16 *How.*, 417) it was held that the court, in certain instances, could receive other evidence, in its discretion, upon the same question upon which the referee had reported the evidence, but that was not upon any direct question which had been referred.

When there is a special verdict the court cannot pass on any fact not stated or derivable from the facts appearing by such verdict (*Williams vs. Jackson*, 5 *Johns.*, 502), except such as are admitted by the pleadings. (*Basto vs. Himrod*, 8 *N. Y.*, 483.)

The requisites of a special verdict are the same now as they were before the Code. (*Williams vs. Willis*, 7 *Abb.*, 90.) It must find all the facts that are directed to be found or a new trial will be ordered. (*Eisemann vs. Swan*, 6 *Bosw.*, 669; see *Spencer vs. Barnett*, 35 *N. Y.*, 94.)

in order to obtain a final judgment, is the same as upon a report of the same facts. (*Code*, §§ 272, 260; *Rules*, 47, 40, 46; *Grogan vs. The Mayor*, 2 *E. D. S.*, 693; *Dort vs. McAdams*, 27 *Barb.*, 187.)

As to how the same may be reviewed on appeal or new trial, see *Rule* 40, &c., and *Code*, §§ 264, 265.)

724. The statement of facts must support the conclusions of law, or the judgment will be reversed. No fact can be implied from the conclusions of law. (*Tomlinson vs. Mayor*, 23 *How.*, 452.)

725. As to sufficiency of finding of fact to support conclusions of law in these cases, see *Smith vs. Coe*, 29 *N. Y.*, 666.

726. If the finding of fact is desired to be more full, it must be obtained on application to the judge or referee who tried the cause. The remedy is not by appeal. (*Smith vs. Coe*, 29 *N. Y.*, 666.)

727. If the judge fail to specify the relief granted or the determination of the action, it is an irregularity which may be taken advantage of even on appeal. (*Chamberlain vs. Dempsey* 14 *Abb.*, 241.)

728. When similar errors are made by a referee, it may be sent back for a further report, the same as in similar equity cases under the Code.

729. If a party who has the report neglects or refuses to, enter judgment, after being required in writing to do so by any interested party, an order may be obtained directing him to file the report and enter judgment thereon. (*Richmond vs. Hamilton*, 9 *Abb.*, 71; *Lentilhon vs. City of New York*, 3 *Sand.*, 721.)

Form of Judgment.

730. The *form* of the judgment should be the same as a decree in other equity cases. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Randolph vs. Leary*, 3 *E. D. S.*, 637; *Althause vs. Warren*, 2 *E. D. S.*, 657; *Teaz vs. Christie*, 2 *E. D. S.* 635; *Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284.)

731. A judgment must be entered, based upon the findings of fact and of law, when the trial is by the court or referee

(Code, §267, §272). In all equity actions, particularly if special relief is granted to any party, the judgment should recite the findings of fact in a general way, and of law, and be entitled at Special Term and entered in the form of an order, by direction of a judge of the court. (*Hancock vs. Hancock*, 22 N. Y., 568. See form *post*.)

732. A judgment containing directions not contained in the findings, is unauthorized, and will be reversed. (*Chamberlain vs. Dempsey*, 15 Abb., 1; *Id.*, 14 Abb., 241; see *Loeschigk vs. Addison*, 4 Abb. N. S., 210.)

733. The form of the judgment in *Althause vs. Warren*, (2 E. D. S., 657,) was before the amendment of the Code (§267), requiring the court, in a trial, to give a decision in writing, containing a statement of the facts found and the conclusions of law separately.

As the Code (§267 §272) now is, the form of a judgment, where the trial is by a court or by a referee, is the same, and must be entered on the findings. It is not necessary, however, to recite the findings of fact at large. (*Bunten vs. Orient Ins. Co.*, 8 Bos., 448), but they should be referred to. (*Id.*, 1 *Van Santvoord's Eq. Prac.*, 585.)

734. It was usual under the former law to insert in the judgment directions to the sheriff as to the sale and disposition of the proceeds, &c. (*Althause vs. Warren*, 2 E. D. S. 657; *Eugleson vs. Clark*, *Id.*, 644; *Randolph vs. Leary*, 3 *Id.*, 637; *Smith vs. Cor. y*, *Id.*, 642), in the same manner in detail as in foreclosures of mortgages. (*Id. Rule* 73, 2 Abb. Forms, 565.)

735. The decree in the case of *Meehan vs. Williams*, which the court approved of as to form (36 How., 73; see *Judgment roll*, filed Aug. 24th, 1868, in *Com. Pleas*), was precisely like a decree in foreclosure of a mortgage, and the same in form as in *Althause vs. Warren*.*

* The following is the judgment or decree as finally settled and entered in accordance with the decision of the judge in the case of *Althause vs. Warren* (2 E. D. S., 657).

At a Special Term of the Court of Common Pleas for the city and county of New York, at the City Hall of the city of New York, the 28th day of June, 1856.
Present—Hon. Charles P. Daly, judge:

Title of the cause—

This action having been commenced to recover from the defendant the sum of

736. When prior incumbrancers are not made parties, it is not necessary that the judgment should provide that the property be sold subject to their interest, as only the right, title and interest which the owner had at the time of the filing of the notice can be sold. (§ 1 as amended in 1866; *Randolph vs. Leary*, 3 *E. D. S.*, 637; *Smith vs. Corey*, 3 *E. D. S.*, 642; *Althause vs. Warren*, 2 *E. D. S.*, 657; and the judgment may so direct. (*Id.*)

737. The decree in foreclosure cases generally contains a clause, that on the sale all equity of redemption of the owner be cut off. This is not necessary in decrees *in rem.*, as the right of redemption under the Revised Statutes does not apply to proceedings *in rem.* (*Randolph vs. Leary*, 3 *E. D. S.*, 637; *Smith vs. Corey*, 3 *E. D. S.*, 642; *Meyers vs. Seebald*, 11 *Abb., N. S.*, 326.) This cannot be necessary in lien cases, as all the right, title and interest of the owner is sold. (*Id.*)

three thousand four hundred and forty-one dollars and eighteen cents, with interest thereon from the 27th day of August, 1855, for work and labor done and materials furnished by the plaintiffs to the defendant towards the erection of two buildings on two lots of ground situate in the Third ward of the city of New York, on the westerly side of Greenwich street, and known as numbers 252 and 254, in said street, and hereafter more particularly described, of which lots the said defendant was the lessee, and to foreclose the lien which the plaintiffs had acquired for said sum on the said lots and the said buildings thereon erected, pursuant to the statute in such case made and provided, such lien being filed by the above-named plaintiffs in the office of the clerk of the city and county of New York, on the 5th day of December, 1855, against the above-named defendant, as lessee as aforesaid, such proceedings were thereupon had that the defendant was brought before this court, and duly appeared in this action, and the plaintiffs served their complaint, and the defendant answered thereto; whereupon, issue being joined between the parties, the said issues came on to be tried by consent of the respective parties at a Special Term of this court, held before the Honorable Charles P. Daly, one of the judges of this court, at the City Hall of the city of New York, on the 10th day of June, 1856, whereupon the said court, after hearing the testimony of the respective parties and their respective counsel, then and there decided the whole of the issues for the plaintiffs, and ordered judgment for the plaintiffs.

Now, upon motion of Benedict & Boardman, attorneys for the plaintiffs, it is adjudged and decreed that the defendant, Edward Warren, is indebted to the plaintiffs, Samuel B. Althause & Nicholas Ludlum, in the sum of \$3,632.40, together with the sum of \$148.81, costs and disbursements, duly adjusted by the clerk of this court, amounting, altogether, to the sum of \$3,781.21.

And it is further ordered, adjudged and decreed that the said plaintiffs have a good, valid and subsisting lien on the said lots and buildings for the said amount

738. So much detail as was formerly inserted in decrees of this nature seems to be unnecessary now in a decree which *may be used* by the sheriff as an execution to enforce the judgment, as was intimated by the court in *Randolph vs. Leary* (3 *E. D. S.*, 637), and in *Meyers vs. Seebald* (11 *Abb., N. S.*, 326). The sheriff is bound by law to execute all processes of courts of record when required (*Code*, § 419; 3 *R. S.*, 739, § 98; *Smith vs. Corey*, 3 *E. D. S.*, 642); and Rules 74 and 75 of the court direct how the sheriff shall proceed when lands are directed to be sold under an order or judgment of any court.*

739. A judgment *in rem.* should contain some directions for enforcing the lien (*Chapman vs. Lemon*, 11 *How.*, 235; *Dicker-*

with interest thereon, and to secure the payment thereof to the extent of the right, title and interest which the said defendant, Edward Warren, had, on the 5th day of December, 1855, in the two buildings and lots of land and appurtenances thereto belonging, situated, &c.

(Here follows a description of the premises by metes and bounds.)

And that the said judgment be duly entered on the lien-docket of this court, pursuant to the statute in such case made and provided.

And it is further ordered, adjudged and decreed that the interest which the said Edward Warren had on the said 5th day of December, 1855, be sold by the sheriff of the city and county of New York, to the extent of the right which the said defendant had at that time in the said premises and buildings, subject to any prior lien existing thereon; that the proceeds of such sale shall be applied by said sheriff to the payment to the plaintiffs of their costs, and of the amount found due as aforesaid, and that the residue of such proceeds of said sale be paid to the clerk of the city and county of New York, to abide the further order of this court.

It is further ordered and adjudged that the said sheriff make a report of such sale, and file it with the clerk of this court, with all convenient speed, and that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiffs, with interest and costs, as aforesaid, the said sheriff shall specify the amount of such deficiency in his report of the sale, and that the plaintiffs have execution therefor.

(Signed)

CHAS. P. DALY,
J. C. P.

* This detail arose in mortgage cases as follows:

Previous to the Law of 1847 (*Ch.* 280), a decree in foreclosure cases could only be executed by a Master in Chancery. The Chancellor had prescribed under the Law of 1840 the form (No. 14) of such decree. When the Law of 1847 allowed the sheriff to sell in the same manner as a master, the same form as to him was continued. And when the master's office was abolished and a referee was empowered to sell, the same form was very properly used as to him, because he was not an officer of the court authorized to execute process under the statute, and his directions must be special. The Code (§ 285) supersedes that practice so far as relates to the execution of a judgment by the sheriff.†

man vs. Abrahams, 21 Barb., 551); but a mere direction that the same be sold according to law will be sufficient.

"The statute allows the court to enforce the performance of its decrees by execution, and to entitle a party in whose favor a decree has been made to an execution thereon, it is not necessary that the decree itself shall contain a provision to that effect. The execution to enforce the performance of a decree is a matter of right under the statute; and the party in whose favor the decree is made is entitled, as of course, to an execution thereon, unless there is something in the decree itself prohibiting the issuing of an execution for a limited period, or until the further order of the court" (*Otis vs. Forman*, 1 Barb. Chan., p. 30.)

740. The statute of 1855, unlike that of any other statute before or since that relating to liens in New York city, prescribed the form for judgment. The present statute does not prescribe the form of the judgment or of the execution (*Meehan vs. Williams*, 36 How., 73), but merely says that "Judgments may be enforced by an execution, in which the property on which the lien is adjudged may be sold and the proceeds distributed as ordered by the judgment," &c. (§ 9.)*

741. From the practice in similiar actions and the general tenor of this act, the judgment therefore must be in one or more of four special forms, to wit:

(1.) When in *favor of lienors*, it should specify the property upon which the liens are respectively adjudged to be valid,

* The Act of 1852 (*Ch.* 384), relating to Westchester and other counties in this State, did not prescribe the form of judgment in lien cases. Under that act the Court of Appeals particularly approved of the form of the judgment in the case of *Blauvelt vs. Woodworth* (31 N. Y., 285), it was entered as at Special Term, and after specifying the amount of the judgment, &c., contained the following directory clause:

"And it is further adjudged, that the said Daniel Blauvelt have execution therefor, and that the sheriff of the county of Westchester be and he is hereby directed to sell all the right, title and interest which the said W. W. Woodworth had in and to the said land and premises and in and to the said building and appurtenances, on the 4th day of June, 1853, upon which day it is hereby adjudged that the said Daniel Blauvelt became entitled to and acquired a lien upon the said lands and premises and upon the said buildings and appurtenances, under and by virtue of an act entitled," &c. (*See Blauvelt vs. Woodworth*, in *Court of Appeals Cases*, Vol. 79, at N. Y. Law Institute Library.)

the amount of each, the time of filing the notice, and if the amount is not due, when it will become due, and direct that the property be sold according to law (if the debt is not due, should specify that the property be sold when the debt does become due), and should direct how and when the proceeds of such sale shall be distributed, and specify the amount and to whom each is personally liable, and the amount of costs as to each of the parties as against the other, and that in case of a deficiency on such sale to satisfy the judgment or any part of it, that execution issue therefor.

2. Where money has been deposited, and the lien against the property discharged under § 10, a special judgment against the property would be erroneous (*Dunning vs. Clark* 2 E. D. S., 535). The judgment should direct the county clerk to pay the money to the parties in whose favor the judgment is (*Id.*), and may provide that in case of a deficiency to satisfy the judgment, that execution issue therefor, and may be similar to cases of foreclosure on bond and mortgage.

(3.) If the judgment is in favor of the owner, that the property be exempt from such liens, or that they be discharged, particularly specifying each of them, and may direct the clerk of the county to discharge the same of record. (*Ante*, 215, 410, 411; *Sullivan vs. Brewster*, 1 E. D. S., 689.)

(4.) If the proceedings are dismissed other than upon the merits, the judgment may be in the form usual in equity cases; if dismissed upon the merits, it should be according to the fact as the case may be. (*Teaz vs. Chrystie*, 2 E. D. S., 635.)

As to preference of personal judgments for deficiency, see *post*, 864.

Entry of Judgment.

742. Judgments in these proceedings are entered in the same manner as in other equity actions. (*Doughty vs. Devlin*, 1 E. D. S., 625; *Brown vs. Wood*, 2 Hilt., 579.)

743. A judgment, except in the cases specified in the Code (§ 278), cannot be entered without the order of the court, even by consent (*Beach vs. Shaw*, 4 Barb., 288; *Blk. of Rochester vs. Emerson*, 10 Paige, 359; *Flynn vs. Mid. R. R.*, 6 How., 308). Judgments at law and in equity cannot be assimilated. (*Lynch vs. Rome Gas L. Co.*, 42 Barb., 591.)

744. A referee cannot sign a judgment on his report in an equity action; it must be signed by a judge of the court and entered in form as if pronounced by the court. (*Hancock vs. Hancock*, 22 N. Y., 568; *Coope vs. Bowles*, 18 Abb., 442; *Chamberlain vs. Dempsey*, 36 N. Y., 144.)

745. When a referee who tried a cause settled the form of the judgment and directed its entry, and it was thereupon entered without any direction from a judge of the court, it was set aside on motion. It is not a ground of reversal on appeal. (*Coope vs. Bowles*, 18 Abb., 442.)

746. In an action tried by a court without a jury, the only guide for the entry of the judgment by the clerk, pursuant to § 267, is the formal decision filed by the judge before whom it was tried, containing his findings of fact; and if the clerk, in entering such judgment, deviates from the decision, the judgment will be set aside. (*Loeschigk vs. Addison*, 4 Abb., N. S., 210.)

747. When the findings are by one judge, the form of the judgment may be settled and directed to be entered by another judge of the same court (*Chamberlain vs. Dempsey*, 36 N. Y., 144); but it is discretionary, and some reason for it must be stated that is satisfactory to the court, if there is any objection to it.

748. It may be entered immediately upon the report without notice when it is upon all the issues (*Code*, § 272, § 267; *Lynde vs. Cowenhoven*, 4 How., 327; *Renouil vs. Harris*, 2 Sand., 641; *Clark vs. Andrews*, 1 Code, Rep., 4; *Doke vs. Peek*, do., 54; *Kelly vs. Searing*, 4 Abb., 354; *Townsend vs. Low*, 4 ed., Ch., 249; *Rose vs. Woodruff*, 4 Johns, Ch. 547); but it is usual to serve a copy of the report or findings of the court and the proposed judgment and a notice of the settlement, at least one day prior thereto, as on the settlement of the forms of orders in litigated motions.

749. Where the defendant has appeared, the *plaintiff* cannot settle *ex-parte* the form of the judgment if it grant special relief. (*Wood vs. Lambert*, 3 Sand., 724.)

750. If judgment is settled *ex-parte*, it may be modified on re-settlement on application of the party desiring it. (*Bowman vs. Earle*, 3 Duer, 691; *Cashman vs. Shepard*, 4 Barb., 113.)

751. The form of the judgment may be settled and signed before the costs are adjusted, and a blank left for the insertion of them therein. (*Cotes vs. Smith*, 29 *How.*, 326.)

752. When a motion is made to confirm a referee's report which is upon *all the issues*, the form of the judgment can only be settled on such hearing, and it must conform to the facts found and the conclusions of law as stated in the report, or it will be irregular. (See *ante*, 731, 732.)

753. The form of the judgments in these cases should be the same in the *Marine and District Courts* as in courts of record, only the findings are in the decree and not separately given.

754. Any clauses in such a judgment of the Marine or District Courts directing the sheriff how to proceed on the sale would be of no force, and if the court has jurisdiction to direct the marshal, and he is directed instead of the sheriff in all the details usually contained in a judgment of foreclosure, this might prevent the party from filing a transcript and enforcing the judgment by the sheriff as a judgment of the Court of Common Pleas under § 68 of the Code.

755. A judgment that directs in effect that the premises be sold by execution in the manner prescribed by law, and that out of the proceeds of such sale the sum of ——— dollars be paid to ———, &c., and that if the proceeds of such sale be insufficient to pay the amount as directed by the judgment as aforesaid, that execution may issue against the real and personal property of (specify those personally liable), for such deficiency, is all that is necessary. (*Ante*, 739, 740.)

756. A certified copy of such a decree (or a certified copy of a transcript of it filed in the county clerk's office) with a direction upon it signed by the attorney issuing it, requiring the sheriff (or other officer empowered by law to enforce judgments) to enforce it according to law (*Code*, § 289), is all that is necessary; or the attorney might go further and give all the directions to the sheriff how to proceed as specified in the rules of the court (73, 74, 75) in cases where sales of real estate are made on executions. (See *post*, "Executions.")

757. The *transcript* to be furnished to the clerk is not to be *docketed* as in an ordinary personal action; it must be entered

in the "lien docket," in the last column. It is not for the purpose of incumbering all the property of the defendant, but for the purpose of showing that the lien has been merged or discharged. This is apparent by reading § 10. (*Lenox vs. Trustees*, &c. 2 *E. D. S.*, 673; *Sullivan vs. Brewster*, 1 *E. D. S.*, 689.)

758. The judgment or transcript must also be entered in the judgment book, and must specify clearly the relief granted or other determination of the action. (*Code*, § 280.)

759. When judgment against specific property is obtained in any other court than the Supreme Court, a certified copy of the decree should be filed in the office of the county clerk *before the lien expires* by limitation, because if the property should be transferred after the year expired, and intermediate the docketing of the judgment, the lien on the property would be lost. (3 *R. S.*, p. 638, § 11.)

760. The county clerk is required to search for liens within a year, and for judgments and decrees against the property, and if the lien had expired and no judgment or decree was found, a *bona fide* purchaser would be protected.

761. A *delay* in entering the judgment in the judgment book does not affect its validity. (*Butler vs. Lee*, 3 *Keyes*, 76; *Lynch vs. Rome G. L. Co.*, 42 *Barb.*, 591.)

762. The final decree of a court of equity *takes effect* when it is declared by the court, and the record when made up is only evidence of the decree. (*Id.*)

763. The only *object* of docketing a decree in the county clerk's office is to make it a constructive notice of a lien upon real estate. (3 *R. S.*, 639, §§ 14, 16; *Wheeler vs. Hermans*, 3 *Sandf. Ch.*, 597.)

764. The only *lis pendens* in these proceedings is that prescribed by § 6, and, as that expires with the lien, it is of no avail in such case. (*Porschke vs. Kedenburg*, 6 *Abb., N. S.*, 172; *Kaylor vs. O'Connor*, 1 *E. D. S.*, 672.)

765. The *lis pendens* under the code (§ 132) is only authorized in actions and proceedings brought under it, and would be of no effect in these proceedings.

766. A judgment in these proceedings continues the same

time as any other judgment in an ordinary action. (*Maltby vs. Greene*, 1 *Keyes*, 548.)

See *post*, "Execution," as to manner of enforcing judgments.

767. Judgments or referee's report may be set aside on motion. (*Barton vs. Hermann*, 8 *Abb.*, *N. S.*, 399.)

768. Where the lien expired between the time of the close of the testimony and the referee's report, a judgment entered thereon was set aside on motion (*Barton vs. Hermann*, 8 *Abb.*, *N. S.*, 399; *Grant vs. Vanderwols*, 57 *Barb.*, 165). A sale under such a judgment was held invalid. (*Hall vs. Lamb*, 3 *Lansing*, 34.) *

769. If a judgment is erroneous in form, the same would be allowed to be amended on motion. (*Dunning vs. Clark*, 2 *E. D. S.*, 535; *Walker vs. Paine*, 2 *E. D. S.*, 662.)

770. An erroneous personal judgment entered upon a referee's report in these cases may be corrected on motion by the entry of a new judgment on the same report. (*Walker vs. Paine*, 2 *E. D. S.*, 662.)

Effect of Judgment.

771. The effect of a judgment against the owner in favor of a sub-contractor or other person to whom the owner is *not* liable by personal contract is to be regarded as a legal assignment from the debtor of the sum due from the owner to the person recovering such judgment (*Collins vs. Ellis*, 21 *Wend.*, 397; *Rudd vs. Davis*, 1 *Hill*, 277; *Miller vs. Moore*, 1 *E. D. S.*, 739; *Cannon vs. Van Wagner*, 2 *E. D. S.*, 590). And payment of such judgment by the owner is deemed a payment by him to his contractor. (*Cusack vs. Jenkinson*, 1 *E. D. S.*, 716; *Sullivan vs. Decker*, 1 *E. D. S.*, 699; *Cannon vs. Van Wagner*, 2 *E. D. S.*, 590; *Miller vs. Moore*, 1 *E. D. S.*, 739.) †

772. Such judgment is *not final* and conclusive upon the contractors and persons interested in the controversy unless they

* Under the law of 1844, it was held that the judgment must be obtained and execution issued thereon within the year. (*Peeman vs. Arment*, 5 *Leg. Ob.*, 381.)

† The act of 1855 was only a statutory declaration of the law, to wit, that "the payment by the owner of any valid lien, or of any judgment recovered in pursuance of the said act, shall enure to him as a payment to the amount thereof to the contractor." (§ 4.) The decisions cited in the text were before the act of 1855.

are made parties. It is well established that a person cannot be bound by a proceeding which in effect divests him of a legal right and transfers it to another, unless he be a party. (2 *Dana*, 466; *Sullivan vs. Decker*, 1 *E. D. S.*, 699.)

773. A proceeding of that nature, although authorized by statute, would be unconstitutional and void. (*Sullivan vs. Decker*, 1 *E. D. S.*, 699.)

774. "In order to bind the contractors and deprive them of their admitted title to whatever money is due from the owner, they must have legal notice of the proceeding—notice in such sense as calls upon them by authority of law to defend the claim and opens to them the means of doing so." (*Woodruff, J., in Sullivan vs. Decker*, 1 *E. D. S.*, 699.)

775. When the claimant is a sub-contractor, if the owner wishes to protect himself, he must have the contractor made a party. (*Id.*)

776. A judgment against a party is a judgment against his privies, that is, those claiming under him (1 *Greenleaf Ev.*, §§ 523, 189), and hence would be as conclusive against the contractor as the sub-contractor, and the questions having been once contested, all parties would be barred from any further litigating the matter. (1 *Greenleaf Ev.*, § 522; 2 *Phil. Ev.*, p, 60, note 278.)

777. In order to prevent a sub-contractor from being oppressive to his contractor (if he is so inclined), the judgment might provide that it should be first enforced against the owner to the extent due from him to the contractor, or an endorsement to that effect should be made upon the execution. In any event, the sheriff should proceed in that manner in the enforcement of an execution.

778. If the lien proceeding is dismissed or decided against the claimant for other cause than on the merits of the indebtedness to the claimant, it is no bar to a personal action against the contractor (*Barton vs. Hermann*, 3 *Daly*, 320; *Sullivan vs. Brewster*, 1 *E. D. S.*, 689). But it is a bar if it is decided as to the merits of the indebtedness to the claimant. (*Schaettler vs. Gardiner*, 41 *How.*, 243; *Sullivan vs. Brewster*, 1 *E. D. S.*, 689.)

779. The recovery of a judgment in an ordinary action for the debt does not of itself prevent the effect of the prior or subsequent filing and enforcement of the lien. (*Teaz vs. Christie*, 2 *E. D. S.*, 635; *Westervelt vs. Levy*, 2 *Duer*, 354; *Maxey vs. Larkin*, 2 *E. D. S.*, 540; *Gridley vs. Rowland*, 1 *E. D. S.*, 670; *Cremin vs. Byrnes*, 4 *E. D. S.*, 756; *Cronkrite vs. Thomson*, 1 *E. D. S.*, 661; *Randolph vs. Leary*, 3 *E. D. S.*, 637; *Pollock vs. Ehle*, 2 *E. D. S.*, 541; *Ante*. 661.)

780. A judgment of nonsuit in these proceedings or a judgment of dismissal on the trial is a bar to a second proceeding to enforce the same lien. (*Sullivan vs. Brewster*, 1 *E. D. S.*, 681.)

781. A failure to recover against the owner is no bar to a personal action against the contractor. (*Cusack vs. Tomlinson*, 1 *E. D. S.*, 716; *Sullivan vs. Brewster*, 1 *E. D. S.*, 681; *Gridley vs. Rowland*, 1 *E. D. S.*, 670; *Smith vs. Ferris*, 1 *Daly*, 18.)

782. When, on appeal, a judgment is reversed or affirmed, with or without costs, it may be entered as a common law judgment without being signed by the presiding justice, or without any notice of settlement being given.

783. When the judgment gives any special relief, it must be settled by one of the judges who heard it, on notice, and entered by the direction of the court, the same as an order of the General Term. (*Clapper vs. House*, 6 *Paige*, 149; *Eagleson vs. Clark*, 2 *E. D. S.*, 644.)

784. If the owner should recover judgment and the lien be discharged, and such judgment should be afterwards reversed on appeal and he had disposed of the property in the meantime, he would still be personally liable to a sub-contractor for the amount due the contractor at the time the notice was filed, because the lienor is entitled to have his rights restored as far as possible. (*McGuckin vs. Coulter*, 1 *Jones & S.*, 324.)

CHAPTER VIII.

COSTS.

785. The law of 1863 does not provide, in terms, for costs, as did the former law. The only mention of costs is in §§ 5 and 10, showing they were contemplated, and they are given the same as in ordinary equity actions, and extra allowances are now given under § 309 of the Code.

786. Whether these proceedings are regarded as "special proceedings," according to the definition given by §§ 2 and 3 of the Code, or whether they are "civil actions," costs would be the same. (*Laws of 1854, ch. 270, § 3.*)

787. In cases not provided for by the Act of 1854, there is no doubt that the Code regulates the subject of costs where the proceeding partakes of the character of an action and is not excepted from the operation of the second part of the Code, § 471. (1 *Crary's Prac.*, 18.)

788. In whatever court the proceeding is prosecuted, when costs are allowed, they must be taxed at the rate allowed for similar services in civil actions, in *that particular court*.

789. If the foreclosure is regarded as an action, and the costs regulated by the Code, a question arises whether the claimant or plaintiff is not absolutely entitled to costs upon a recovery for any amount. It is an action which a court of justice of the peace has no jurisdiction of under the Code; and, in such cases, the plaintiff is entitled to costs without regard to the amount recovered (§ 304, *subd.* 3), except in certain cases. (*Id.*, *subd.* 4.)

790. In special proceedings and in equity actions costs may be allowed to a party, in the discretion of the court, without regard to the amount in controversy. (*Code*, §§ 304, 306; *Laws 1854, ch. 270; note to § 17, Code.*)

791. In the case of *Dunning vs. Clark* (2 *E. D. Smith*, 535), the court held that, under § 10 of the Lien Law of 1851, the lienor was entitled to costs in all cases in which he recovered a judgment against the owner, without regard to the amount of the controversy or amount of the judgment recovered. (See *Nott's Lien Law*, p. 56.)

792. In *Scarsfield vs. Vaugner* (15 Abb., 65; 38 Barb., 444), in an equity action, the court, at General Term, said: "The question of costs may be affected where the amount in controversy is under \$50," as it was in that case.

793. Equity should follow the law as to giving costs, the same as in other cases, to wit, where the amount recovered is more than \$50, costs should generally be allowed to the party so recovering. If the recovery is under that amount, then costs should not be allowed, but disbursements should be allowed to the successful party.

794. Under §§ 2, 5 and 7, of the Act of 1863, the court has ample power to regulate the costs in such manner as shall be equitable and just, that is, according to the discretion of the court, with the maxim in view that "whoever hath power to act at discretion is bound by the rule of reason and law." (2 Inst., 16, 298.)

795. No costs can be given, after notice of lien is filed, until the commencement of proceedings to foreclose by service of the notice. (*Reynolds vs. Hamil*, 1 Code R., N. S., 230.)

796. After these proceedings have commenced, they are amendable as to form at all times, without costs. (§ 5.)

797. When a party can obtain relief by motion as well as by demurrer, only motion costs will be allowed on demurrer. (*Spratt vs. Nicholson*, 3 Daly, 156.)

798. The discharge of the lien on the property, by the deposit of the amount of the lien, under § 10, subd. 2, does not relieve the party so depositing it of costs of the proceeding.

In *Dunning vs. Clark* (2 E. D. Smith, 535), the court said: "The payment of the money to the county clerk by the owner has no other effect than to release the land from the plaintiff's lien and to substitute in its place the money so paid. The right to the possession of it still remains to be disposed of, and to recover it the plaintiff must still prosecute their claim before the court. If they fail in establishing their claim the defendant would be entitled to a return of the money from the clerk. It must, therefore, be evident that the payment of the amount claimed to the clerk in no wise settles the rights of the parties, or relieves the defendant from his liability for costs of the proceeding."

799. If the owner is made a party, and the contractor deposits the money, under §10, the owner's name may be stricken out without costs and the action proceed. (*Schaettler vs. Gardiner*, 41 *How.*, 243.)

800. When the sub-contractor makes the deposit, and the only claimants are persons engaged by him, the contractor's name should be stricken out, without costs in such cases.

801. These proceedings may be the same as in cases of claims to surplus money in mortgage cases.* (§ 7; *Hubbell vs. Schreyer*, 14 *Abb.*, 284; see *ante*, "Modes of Trial.")

802. Extra allowances, under the Code cannot be given to the contestants in such cases, but the court can and will allow a suitable compensation in addition to costs. (*N. Y. Life Ins. Co. vs. Vanderbilt*, 12 *Abb.*, 458.)

803. The costs are not recoverable until service of the notice to foreclose the lien. (*Reynolds vs. Hamil*, 1 *Code R.*, *N. S.*, 230.)

804. It was held that § 308 of the Code did not apply as to extra allowances for costs in these proceedings under the former law, when no defense was put in. (*Randolph vs. Foster*, 2 *E. D. S.*, 648.)

805. A percentage under § 308 of the Code, as on the foreclosure of a mortgage is not proper. (*Randolph vs. Foster*, 2 *E. D. S.*, 648.)

806. In proceedings against an owner by a sub-contractor, after service of the notice to foreclose the lien, the owner deposited the amount of the lien with the county clerk and failed to appear on the day designated in the notice, and allowed judgment to be entered by default for the amount of the claim and costs, it was held proper. (*Dunning vs. Clark*, 2 *E. D. S.*, 535; *Eagleson vs. Clark*, 2 *E. D. S.*, 644.)

807. Where the owner suffers default and the contractor litigates, only the contractor can be made liable for the costs of that litigation. (*Eagleson vs. Clark*, 2 *E. D. S.*, 644.)

* Under the Act of 1862, relating to the counties of Kings and Queens, subsequent lienors may proceed as to surplus moneys, the same as in mortgage cases.

Costs are allowed to claimants and contestants on claims for surplus money in mortgage cases. (*Lawton vs. Sager*, 11 *Barb.*, 350; *Brevier vs. Schoonmaker*, 29 *How.*, 422; *N. Y. Life Ins. Co. vs. Vanderbilt*, 12 *Abb.*, 458.)

808. The owner will be compelled to pay costs personally if they are made or incurred in consequence of improper litigation produced by himself. (*Doughty vs. Devlin*, 1 *E. D. S.*, 625; *Dunning vs. Clark*, 2 *E. D. S.*, 535; *Eagleson vs. Clark*, 2 *E. D. S.*, 644.)

809. When judgment is rendered against an owner for costs they are chargeable against the property, and should be decreed to constitute a specific lien thereon. (*Eagleson vs. Clark*, 2 *E. D. S.*, 644; *Althause vs. Warren*, 2 *E. D. S.*, 657; *Dunning vs. Clark*, 2 *E. D. S.*, 535; *ante*, 681.)

810. Where a notice of claim was filed by a sub-contractor and the owner retained the amount claimed, and on proceedings to foreclose the lien interposed no obstacle to its collection and suffered a default to be taken against him, but the contractor, having caused himself to be made a party, whereupon a protracted litigation ensued between the claimant and the contractor, it was held that the owner should not be charged with the costs of the litigation between the claimant and the contractor, to determine in effect the right as between them to the money held by the owner. (*Eagleson vs. Clark*, 2 *E. D. S.*, 644.)

811. And the owner's omission to pay the money into court, or to the county clerk, in discharge of the lien, will not operate in such case to charge him with the costs of the litigation. (*Id.*)

812. Costs of motions, in these proceedings, are in the discretion of the court, the same as in actions.

813. Where the plaintiff does not make the contractor a party defendant, and the owner moves to bring in the contractor, the court will not ordinarily charge the plaintiff with costs of motion. (*Foster vs. Skidmore*, 1 *E. D. Smith*, 719.)

814. Where the defendant made an offer for judgment under § 385 of the Code, and the claimant afterwards recovered judgment for a less amount than the offer, costs were given against the plaintiff. (*Knapp vs. Brown*, 11 *Abb.*, *N. S.*, 118.)

815. When proceedings are commenced against an owner, and he has an amount in his hands which he is willing to pay to any party entitled thereto, but it is less than the claims of the sub-contractors, he should apply to the court for leave to

pay it into court without costs, and his name be stricken from the complaint. If the court will not allow him to do this without costs, he can serve an offer to allow judgment for the amount he holds and costs, and still hold the money, and if the claimants recover less than his offer, they must pay costs.

816. In *Knapp vs. Brown*, 11 *Abb., N. S.*, 118, the plaintiff's complaint was dismissed by the referee as to Jackson, an alleged owner, without costs.

817. Judgment for defendant on demurrer, on the ground of absence of ownership, entitles the defendant (owner) to a judgment for costs. (*Jackson vs. Sloane* 2 *E. D. S.*, 616.)

818. On a dismissal of the notice of foreclosure for irregularity, costs were given to the defendants. (*Reynolds vs. Hamil*, 1 *Code R., N. S.*, 230.)

819. The court or a referee always allow disbursements, and frequently allow a specified sum, to wit, \$30, as costs as trial fee to each of the various lienors who have only proved their claim without any contest. When this is done by a referee the court will not disturb it.

820. When no mention is made of costs in the findings, the prevailing party is, nevertheless, entitled to his disbursements. (*Newton vs. Sweet's Ex.*, 2 *Code Rep.*, 61; *do.*, 4 *How.*, 134; *Taylor vs. Gardner*, 4 *How.*, 67.)

821. When no personal claim is made against a party served, if he unreasonably defends, he must pay costs. (*Code*, § 131; *Lawton vs. Sager*, 11 *Barb.*, 350.)

822. When all the issues are referred the referee should dispose of the question of costs of the proceeding, and as between the parties as to each other. (*Barker vs. White*, 3 *Keyes*, 617.)

823. When the referee is only to report on one or more of the questions of *fact*, he should state his opinion as to the costs, because if the report is not excepted to under Rule 39, it is to stand confirmed as to all things.

824. If the referee's report, in the latter case, does not dispose of the question of costs, an application to the court, on notice, should be made. An *ex parte* order, without notice, confirming the report *with costs*, would be irregular.

825. The amount of costs on appeal from judgment is the same when allowed as in other actions. (*Knapp vs. Brown*, 45 N. Y., 207.)

826. On appeals from the Marine and District Courts, § 371 of the Code applies as to costs, as such appeals are regarded as an appeal from an ordinary action in these courts. (*The People and Bendon vs. Co. Judge, Rensselaer Co.*, 13 How., 398.)

827. On affirmance of a judgment which directed the property to be sold to satisfy the liens upon it, the court will order that the costs of the appeal be a specific lien upon the property, and that the same be paid out of the proceeds of the sale thereof (See *ante*, 157). In this case the judgment of affirmance should be *settled on notice*, and entered by the direction of one of the judges of the General Term, where it was decided. (*Ante*, 783.)

CHAPTER IX.

EXECUTION.

828. It is provided by the statute that judgments shall be enforced by *execution*, in which the property on which the lien is adjudged may be sold, and the proceeds distributed as ordered by such judgment; and personal liabilities may be enforced by execution against the property of any party against whom a personal judgment shall have been rendered. (§ 9.)

The *form* of the execution is not otherwise prescribed by this statute. (*Barton vs. Hermann*, 8 Abb., N. S., 399.)

829. The law of 1844 provided "that the *execution* shall direct the officer to sell the right, title and interest which the owner had in the premises at the time of filing the notice prescribed by the first section of this act." (*Chap.* 220, § 10.)

830. The act of 1851 did not prescribe any form for execution, and those of us who then practiced under these acts will remember that the form of execution then used was the same, without question, as under the act of 1844.

831. The act of 1855 prescribed the form of judgment, and in effect the form of execution, and the court said that "It may well be doubted whether, under the act of 1855, there is now any necessity to issue an execution merely for the sale of the defendant's interest, if no costs or other moneys are to be collected. The act speaks of sales of the defendant's interest, under the judgment which specially directs the sale and the change which is made by that statute, or rather the legislative interpretation given by that to the former statute might warrant a proceeding in this case, the same as in the case of foreclosure of mortgage." (*Randolph vs. Leary*, 3 E. D. S., 637; *Eagleson vs. Clark*, 2 E. D. S., 644; *Lennox vs. Trustees of Bap. Ch.*, 2 E. D. S., 672. *Ante.*)

832. The form of the judgment was special, and therefore the form of the execution must be special. An execution must in all cases follow the judgment and be warranted by it. (*Corwin vs. Freeland*, 6 How., 241.)

833. As the judgment under the act of 1855 contained directions for the enforcement of the liens against specific property, the same as in mortgage cases, a certified copy of the judgment (if of a court of record) was in such cases delivered to the sheriff the same as in foreclosure cases, and he proceeds to advertise and sell the property and distribute the proceeds as directed by the decree, and in accordance with the Supreme Court rules relating to foreclosure cases.

834. The Code (§ 285) provides how judgments shall be enforced: "Where it requires the performance of any other act (than the payment of money or the delivery of real or personal property), a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law to obey the same, and his obedience thereto enforced."

835. "It is the duty of the sheriff to obey the judgments and decrees of the court." (*Smith vs. Corey*, 3 E. D. S., 642; 3 R. S., 739, § 98.)

836. If the judgment is of a court of record against specified property, a transcript of it need not be filed in the office of the county clerk before the delivery of a certified copy to the

sheriff for execution. (*Norton vs. Tallmage*, 3 *Ed.*, Ch. 310; *Corey vs. Cornelius*, 1 *Barb.*, Ch. Rep., 571; *Wheeler vs. Hermans*, 3 *Sand.*, Ch. 597.)

837. No proceedings can be taken on any judgment until the record thereof is filed. (3 *R. S.*, p. 638, § 10.)

838. It may be said that in lien cases the execution of the judgment of a court of record may safely be followed as to form and substance in every particular, as in cases of foreclosure of mortgages, when the sale of the property is directed, and also on deficiency. (*Althause vs. Warren*, 2 *E. D. S.*, 657; *Randolph vs. Leury*, 3 *E. D. S.*, 637; *Suydam vs. Holden*, 11 *Abb.*, N. S., 329; *Meehan vs. Williams*, 36 *How.*, 73.)*

839. A referee cannot sell as in mortgage cases. None but those expressly authorized by statute can enforce an execution. (3 *R. S.*, p. 729, § 98; 3 *R. S.*, p. 648, § 38.)

840. Where the defendant is personally liable for a deficiency by the decree on a sale of this nature, and there is a deficiency, no application to the court is necessary, and an execution may issue for such deficiency, as of course. (*Bickwell vs. Byrnes*, 23 *How.*, 486; 2 *Abb. Forms*, 568.)

841. The execution that issues for such deficiency should refer to the decree and the proceedings under it, and conclude in the form of other executions against the property of the judgment debtor, as in foreclosure of mortgage cases, and if the deficiency is against the owner and contractor, one execution should include both.

842. In order to prevent the sub-contractor from being oppressive to his contractor, if he is so inclined, the judgment should provide that it should be first enforced against the owner to the extent due from him to the contractor, or an endorsement to that effect should be made upon the execution. In any event the sheriff should proceed in that manner in the enforcement of such an execution.

* The form of the judgment in the case of *Meehan vs. Williams* (36 *How.*, 73; judgment roll filed in *Com. Pleas*, August 24, 1868), which was approved by the court, was the same in form as *Althause vs. Warren*. (*Ante*, 735 note.)

In the former case the court said: "The decree directs that the premises be "sold under execution, and provides for the manner in which the proceeds shall be "distributed, which is in strict conformity with the provisions of the act of 1863."

843. In case the judgment is for any cause in favor of the owner and against the contractor, or only a personal judgment, a certificate of the judgment should be given the same as certificates of judgment on decrees in the Surrogate's Court, and filed in the county clerk's office, and execution as in ordinary cases may at once issue thereon. (*Lennox vs. The Trustees, etc.*, 2 *E. D. S.*, 673.)

844. An execution against property, generally, may be issued first, and then if it is not collected the specific property may be sold under the decree.* (*Suydam vs. Holden*, 11 *Abb.*, *N. S.*, 329 note.)

845. "The property may be sold under the judgment or "under execution" (*Suydam vs. Holden*, 11 *Abb.*, *N. S.*, 329 note). What has been said so far in this chapter relates to sales under the judgment (decree) as distinguished from an execution issued upon it.

846. The *form* of the execution as such may be the same as was prescribed by the Act of 1844 (*ante*), which was only a statutory declaration of the law in similar cases where liens

* This could not be done against the owner under the law of 1855, where he was not personally liable. (*Lennox vs. Trustees, etc.*, 2 *E. D. S.*, 673.)

In the case of *Spencer vs. Barnett* (35 *N. Y.*, 94), the decree provided that an execution should first issue against general property. The decree was as follows: "It is further ordered, adjudged and decreed that upon the return of an execution against the defendant, Sarah Barnett, upon the aforesaid personal judgment unsatisfied in whole or in part, that the interest which the said Sarah Barnett had on the said 9th day of May, 1857 (the time the lien was served and filed), in the above described premises, be sold by the sheriff of the county of Kings, in the same manner and upon the like notice as is required by the rules and practice of this court in mortgage cases, and that the proceeds of such sale be applied by the said sheriff to the payment of the amount of said personal judgment remaining unpaid, with interest thereon, and that the residue of such proceeds of said sale be paid to the treasurer of the county of Kings within five days after the receipt of the same, to abide the further order of this court, and that the said sheriff make a report of such sale, and file it with the clerk of this court with all convenient speed."

"And it is further ordered, adjudged and decreed that the defendants, Sarah Barnett and Symmes Gardner, and all persons claiming under them or either of them, subsequent to the commencement of this action, be barred and foreclosed of all right, claims, lien and equity of redemption in the said premises." (*Spencer vs. Barnett*, in *Court of Appeals Cases*, Vol. 96, at *N. Y. Law Inst. Lib.*)

upon property are to be enforced by execution under a judgment. (See *ante.*)*

847. The form of an execution to authorize the sale of real estate is prescribed by the general statutes (3 *R. S.*, p. 648, § 38; *Code*, § 289.) It may be necessary, perhaps, in an execution in a special judgment declaring a lien and directing a sale and a distribution of the proceeds, that the execution should direct a collection out of the personal property of the owner of the premises before his interest in the real property is sold under the execution. (See *ante*, 844 *note.*)

848. All who have appeared are *not* entitled to notice of sale as in foreclosure cases where the sale is *before* judgment.

849. The law of 1863, like other previous laws relating to Mechanics' Liens, does not prescribe the manner of the enforcement of the judgments of inferior courts—the Marine and District Courts—particularly if the same *directs* the sale of specific property and where the amount of any judgment of such court is under \$25.

850. Although as has been held under the former act that the judgment in these courts, as in a court of record, must be special and may be against the property (*Cronkrite vs. Thomson*, 1 *E. D. S.*, 661; *Lennox vs. Trustees, &c.*, 2 *E. D. S.*, 673); and the property may be the only source out of which the execution can be satisfied, yet that would not mean that the execution could be enforced by these courts in relation to the sale of the property as if they were courts of record.

851. The Revised Statutes (3 vol. p. 446, § 120) do not allow an execution issued by a justice to extend to real estate. When the sale of real property is desired in order to enforce a justice's judgment against real property, it is necessary to docket a transcript and issue an execution from the County Court. By § 69 of the Code, when a transcript of a judgment for \$25 or over of one of these courts is docketed in the office of the clerk of the city and county of New York, the same shall have

* Where property has been attached before judgment, the execution issued in such case after judgment is a special one, directed to the sheriff, reciting the issuing of the attachment and the taking of the property thereon, and requiring a sale of that specific property by him, after which it directs him to sell the defendant's) property generally as in other executions. (see *McKay vs. Harrower*, 27 *Barb.*, 463.)

the same effect as a lien and be enforced in the same manner as, and be deemed a judgment of the Court of Common Pleas.

852. The judgment of a court of record for any amount, however small, may be enforced against real estate by an execution. (3 R. S., p. 637, § 4.) But a judgment of the Marine or a District Court for a sum under \$25 cannot be enforced against real estate. The provisions of the Revised Statutes (*vol. 3, p. 446*) do not authorize a constable to sell real estate, but contemplates its being sold on execution only by a sheriff (3 R. S., 648.)

853. The repealing clause (§ 12) is not sufficient to nullify other statutes excepting those specially referred to in the act as relating to Mechanics' Liens, and the repeal of statutes will not be inferred by implication. (*Potter's Dwarries on Statutes*, 113-154; *Wallace vs. Bassett*, 41 Barb., 92; *The Mayor vs. Walker*, 4 E. D. S., 258; *Van Rensselaer vs. Snyder*, 9 Barb., 302.)

854. The statute has given the Marine and District Courts jurisdiction within certain limits to order the premises to be applied to the satisfaction of the lien. (*Quimby vs. Sloan*, 2 E. D. S., 594.) When that judgment is rendered the jurisdiction of these courts and their officers cease, so far as enforcing the same by a sale of the real property of the judgment debtor, whether it be the specific real property, or general real property.

855. In regard to this same act the question arises whether by its terms a lien could be acquired upon property belonging to the city, to wit, a public school-house, which is by law exempt from sale on execution, and the court held that such property could not be sold in these proceedings because this statute would not be construed as repealing the exemption law, unless by specific language to that effect. (*Brinkerhoff vs. Bd. of Ed.*, 6 Abb., N. S., 418; affirmed as *Poillon vs. The Mayor*, 47 N. Y., 666.)

856. Section 9 merely says that judgments may be enforced by an execution, &c. It must, therefore be inferred that, when a judgment is obtained in one of these courts for \$25 or over, directing a sale of the interest of the owner in real property

that a transcript of such special judgment must be filed and the execution issued to the sheriff as in cases of like judgments in courts of records. It was so held under the Law of 1855. (*Lennox vs. Trustees, &c.*, 2 *E. D. S.*, 673.)

857. Executions on personal judgments can be issued to a marshal the same as in other judgments of said courts, or a transcript can be filed and personal execution issued to the sheriff. (*Id.*)

858. The judgment of the Marine or District Courts amounting in the aggregate to more than \$25 can be enforced by filing a transcript (certified copy) thereof in the office of the County Clerk, and then issue a special execution to the sheriff directing him to proceed as if the same had been obtained in the Court of Common Pleas. (*Ante*, 846, *Code*, §68; *Lennox vs. The Trustees, &c.*, 2 *E. D. S.* 673; see *Carpenter vs. Simmons*, 28, *How.*, 12.)

As to the form of the decree in the Marine and District Courts see *ante*, 753.

859. Unless these courts have full power to direct a marshal to sell the property and enforce the decree the same as the sheriff can in courts of record, there is no mode of enforcing such judgment for a sum *under* twenty-five dollars only by personal execution against those who are personally liable.

860. An execution may be set aside on motion for irregularity. (*Lennox vs. The Trustees, &c.*, 2 *E. D. S.*, 673.)

861. When there are several distinct lots or parcels of land to be sold, unless the judgment directs *how* the same is to be sold, the sheriff can sell them all together, or in such lots or parcels as he thinks will bring the best price. (Rule 75, see *Cunningham vs. Cassidy*, 17 *N. Y.*, 276.)

862. If, however, the owner of any portion of such property shall require such portion to be sold separately, the sheriff must do so. (*Neilson vs. Neilson*, 5 *Barb.*, 565.)

863. These judgments cannot be enforced by attachment under the Code, because they are money judgments. (§ 285, 3 *R. S.*, 849, § 1, *sub.* 3; *Lansing vs. Lansing*, 4 *Lans.*, 377.)

864. *Personal judgments for deficiency* against the *general property* of the debtor take precedence according to the time

of the filing of the notice of lien, or when the judgment for deficiency is docketed, the same as other general judgments (*Ante*, 121, 667).

The Marshaling under § 3 only relates to *liens* against the *specific property*, not to personal judgments as a preference against the general property of the judgment debtor. (*Ante* 665 to 669).

865. Any party beneficially interested under the decree may enforce it (*post*, 873). When the judgment is only personal each party may issue an execution for his part only.

866. After the return by a sheriff of an execution against general property, supplemental proceedings may be taken under the Code as in other actions.

A receiver may be appointed *after judgment*, under § 244 of the Code, to carry the judgment into effect, to dispose of the property according to the judgment (*Chapman vs. Lemon*, 11 *How.*, 235; *Dickerman vs. Abrahams*, 21 *Barb.*, 551), or, to preserve it during the pendency of an appeal (*McMahon vs. Allen*, 14 *Abb.*, 220). When an execution has been returned unsatisfied, in whole or in part, and the judgment debtor refuses to apply his property in satisfaction of the judgment, a receiver may then be appointed as in other actions. (*Code*, 244, *subd.* 3.)

867. The sheriff's fees on these executions are the same as on executions in cases of foreclosure of mortgage.

868. The *time* for the enforcement by execution of judgments in the proceedings are regulated by §§ 283 and 284 of the Code as in other actions.

869. The sale of the premises under a judgment decreeing a specific lien is an absolute sale as in case of the foreclosure of a mortgage, of all the interest of the owner, and there is no redemption. (*Randolph vs. Leary*, 3 *E. D. S.*, 637; *Smith vs. Corey*, 3 *E. D. S.*, 642; *Meyers vs. Seebald*, 11 *Abb.*, *N. S.*, 326, *note.*)

870. Right of redemption under the Revised Statutes does not apply to proceedings *in rem.* (*Id.*).

871. In case the wife of the owner survives the husband, if she has not been made a party she can redeem the premises the same as in foreclosure cases where a wife has not executed

the mortgage or has not been made a party. (2 *Carey S. Prac.*, 264.)

872. A purchaser under these proceedings may be put in possession by the equitable powers of the court, or relieved on motion from completing his purchase, as in other cases of judicial sales. (*Suydam vs. Holden*, 11 *Abb.*, *N. S.*, 329, *note.*)

873. The court has power to require the holder of a judgment of foreclosure to proceed and sell the premises the same as in mortgage cases. (*McLean vs. Tompkins*, 18 *Abb.*, 24.)

874. Where the money is deposited in the county clerk's office pursuant to § 10, before judgment, and the judgment directs, as it must do (*Dunning vs. Clark*, 2 *E. D. S.*, 535), the county clerk to pay the money over to the party in whose favor the judgment is, a certified copy of the decree should be delivered to the county clerk, and he will pay the money to the party entitled thereto under the decree. The amount thereof is endorsed on the decree and if there is any deficiency, an execution may at once issue as in other cases of deficiency. In case the money deposited is directed by the decree to be returned to the party depositing it, he must proceed under § 10 *sub. 4* (*see ante*, "Discharge and Continuance of Lien").

CHAPTER X.

APPEAL.

875. Any party aggrieved by any decision may, within ten days *after notice* of the judgment or decree, appeal from such judgment or any part thereof. If the judgment is in a District Court, or in the Marine Court, to the General Term of the Court of Common Pleas, and if in any other court, to the General Term of such court. (§ 7; *Hubbell vs. Schreyer*, 14 *Abbott, N. S.*, 284.)

876. On appeal from a judgment, these cases are regarded as an appeal from a judgment in an ordinary action. (*Ante, post*, 880.)

877. In order to limit the time to appeal, *written notice*

of the entry of the judgment must be given as in other cases. (*See notes to Voorhies' Code*, § 332.)

878. When the referee's report is served, previous to judgment, the notice of entry of judgment need only refer to it, otherwise it must be served *with the* written notice of entry of judgment. (*Id.*, *Code*, § 263; *Starring vs. Jones*, 13 *How.*, 423.)

879. In order to obtain a review by appeal of certain questions, a motion for a new trial in certain cases must first be made at Special Term. It is in the same manner as in other cases. (*Code*, §§ 264 and 265, *Rule* 40, &c.; *Miller vs. Moore*, 1 *E. D. S.*, 739.)

880. The manner and form of appeal is the same as from a final judgment in an ordinary action in the particular court in which the proceeding is brought. (*Schaettler vs. Gardiner*, 41 *How.*, 243.)

881. If in a court of record, the findings of fact and law must be excepted to, a case served, and amendments may be proposed thereto, and the case printed and served the same as in other actions under the rules in the Supreme Court.

882. Whether regarded as an ordinary action, or as a special proceeding regulated by laws of 1854, ch. 270, § 2, sections 327, 329 and 330 of the *Code* are followed as to what may be reviewed, and the power of the court on appeal.

883. Such appeal only stays so much of the proceedings as a judge of either the court below or a judge of the appellate court shall order to be so stayed until the hearing of such appeal, and on such terms as to security or otherwise as such court or judge may order. (§ 8. *Code*, §§ 348, 338.)

884. On any party being liable for or claiming an amount exceeding five hundred dollars to be affected thereby, such party may appeal to the Court of Appeals, but such appeal shall in no case stay proceedings, without such security as is now required on appeal to such court, nor unless the court in which judgment is rendered shall so order. (§ 8. *Code*, § 338.)

885. Under a judgment which exempts property from a lien, the lien may be discharged of record, notwithstanding an appeal from the judgment, unless the proceedings have been stayed. (*Van Cleve vs. Abbatt*, 3 *Abb.*, *N. S.*, 144.)

886. The surety, &c., for stay on appeal from a judgment, directing the sale of the property, should be the same as in foreclosure cases. (*Code*, § 338; see *Van Cleve vs. Abbott*, 3 *Abb.*, *N. S.*, 144.)

887. The marking of a judgment *in rem.* in favor of a lienor as "secured on appeal," does not release the primary lien of the debt upon a judgment for its enforcement with any such effect as to discharge the lien or security upon the property. The granting of an order to that effect could at most operate only as a stay of the personal judgment. (*Hallaghan vs. Herbert*, 11 *Abb.*, *N. S.*, 326; *Rathbone vs. Morris*, 9 *Abb.*, 213.)

888. Judgment on demurrers are appealable (*Hallaghan vs. Herbert*, 2 *Daly*, 253). As to what orders may be reviewed on appeal from judgment, see *Code*, § 329.

889. Certain orders affecting a substantial right are appealable as orders. (*Hallaghan vs. Herbert*, 11 *Abb.*, *N. S.*, 326; *Id.*, 4 *Daly*, 253; *Schaettler vs. Gardiner*, 41 *How.*, 243; *Id.*, 47 *N. Y.*, 404; *Stone vs. Smith*, 3 *Daly*, 213; *Sullivan vs. Decker*, 1 *E. D. S.*, 699; *McGuckin vs. Coulter*, 10 *Abb.*, *N. S.*, 128.) •

890. An order discharging or continuing a lien or refusing so to do, is appealable. (*Stone vs. Smith*, 3 *Daly*, 213; *McGuckin vs. Coulter*, 10 *Abb.*, *N. S.*, 128; *Porschke vs. Kedenberg*, 6 *Abb.*, *N. S.*, 172.)

891. An order substituting an assignee as a party is appealable as an order. (*Hallaghan vs. Herbert*, 11 *Abb.*, *N. S.*, 326.)

892. An order that refuses to make the contractor a party is appealable as an order. (*Sullivan vs. Decker*, 1 *E. D. S.*, 699.)

893. Any order which would be appealable to the Court of Appeals in any ordinary action, is appealable to that court in these proceedings.

894. An order *refusing* to set aside a judgment because it was rendered after the lien had expired, is *not* appealable to the Court of Appeals. (*Schaettler vs. Gardiner*, 47 *N. Y.*, 404.)

895. Although section 7 provides that appeals may be heard and decided, as in case of appeals from an order at Special Term, the practice is to place appeals from judgments on the calendar, and to hear them in the same manner as a final judg-

ment in an ordinary equity action, and these proceedings are now so regarded in every respect from the time of the joining of issue until their final determination. (*Schaettler vs. Gardiner*, 41 *How.*, 243; *Hubbell vs. Schreyer*, 14 *Abb.*, N. S., 284.)

896. The limitation of ten days as the time to appeal only applies to appeals to the General Term. (§7). Section 332 of the Code, as in other special proceedings or actions, applies as to the time for appeal to Court of Appeals. (*Laws 1854, Ch. 270, § 2 Code*, 332.)

897. Under section 7 of the act of 1863, it is probable that no appeal would lie from a judgment of the Special Term of the Marine Court to the General Term thereof, it must be to the General Term of the Common Pleas direct. But the Marine Court Act of 1872 extends the jurisdiction of that court to mechanics' lien cases where the amount does not exceed \$1,000 (§3, *sub.* 10), and in section 9 of that act it is provided that an appeal may, in all cases, &c., be taken to the General Term of said court.

898. It is reasonable to suppose that section 7 of the law of 1863 now applies to appeals from the General Term of the Marine Court to the Common Pleas.

899. On a reversal on appeal restitution may be ordered to the same extent as in other actions. (*Code*, § 330; *McGuckin vs. Couller*, 1 *Jones & S.*, 324.)

PART IV.

STATUTES RELATING TO KINGS AND QUEENS COUNTIES.

Laws 1862, Ch. 478.

AN ACT for the better security of Mechanics, Laborers, and others who perform labor or furnish Materials for Buildings and other improvements on land in the Counties of Kings and Queens.

Passed April 24, 1862.

SECTION 1. Any person who shall hereafter perform any labor or furnish any materials in building, altering or repairing any house, building or other improvement upon lands or appurtenances to such house or other building,* by virtue of any contract with the owner thereof or his agent, or with any contractor or sub-contractor, or any person *permitted* by the owner of such lands to build, repair, alter or improve as aforesaid, within the counties of Kings or Queens, shall, upon filing the notice prescribed in the third section of this act, have a lien for the value of such labor and materials upon such house,

* See Laws of 1870, ch. 529 and Laws 1872, ch. 669, *ante*, p. 11, extending all lien laws so that they apply to railroads in certain cases, and to wharves, piers, bulkheads and bridges, and other structures connected therewith.

building and appurtenances, and upon the lot of land upon which the same stand, to the extent of the right, title and interest at that time existing, of such owner, in the manner and to the extent hereinafter provided; but such owner shall not be obliged to pay for or on account of such house, other buildings or appurtenances, in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract, except in the case hereafter provided.

But if any such owner, contractor, or sub-contractor, or agent for either of them, shall pay any person any money on any contract for building or repairing any building, by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract, and the amount still due the contractor or his assigns after such payment has been made, shall be insufficient to satisfy the demands made in conformity to the provisions of this act, the owner shall be liable to the amount that would have been due and owing to said contractor or his assignee at the time of the filing of the notice made in the third section of this act, in the same manner as if no such payment had been made.

In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner shall be deemed to be the owner within the meaning and intent of this act, until a deed shall have been actually delivered, so as to pass the fee simple of said premises.

§ 2. Any claimant, under or by virtue of any such lien or any such notice, may, after such labor has been performed or materials furnished, and after the filing of the notice mentioned in the third section of this act, enforce or bring to a close such lien, by a civil action in a court of record in the city or county in which such lands or any portion of them may be situated; subject, however, to the following provisions and restrictions, namely :

First. The manner and form of instituting and prosecuting any such action to judgment, including the personal service of process therein, shall be the same as in other civil actions in the court in which the same may be brought, except as herein otherwise provided.

Second. The summons shall be in the form and manner and as required by the second subdivision of section one hundred and twenty-nine of the civil Code of Procedure.

Third. The claimant under said lien, who shall be the plaintiff in the action, shall annex to his complaint, or set forth therein, a copy of the notice mentioned in the third section of this act, and demand an accounting and settlement in such court of the amount due or claimed to be due for the labor performed or materials furnished as aforesaid, and such complaint shall contain such other matter and allegations as may be material and proper to establish the claim and cause of action of the claimant and plaintiff.

Fourth. The pleadings shall be in manner, form and substance the same as required by law in civil actions and in accordance with the rules and practice of the court in which the action may be brought, and such action shall be brought to an issue and to trial, put upon the calendar, tried, judgment had and entered, and appeal be taken therefrom and costs taxed and recovered pursuant to such law, rules and practice in such civil actions in which the summons is, as mentioned in subdivision two of this section, and such action shall be governed and the judgment thereon enforced in the same manner as upon issues joined and judgments rendered in all other such civil actions aforesaid.

§ 3. Within three months* after the performance of such labor, or the furnishing of such materials, the contractor, subcontractor, laborer, person furnishing materials, or other claimant, shall serve a notice in writing upon the county clerk of the county or counties aforesaid, in which the land and premises or any portion thereof may be situated, specifying the amount of the claim and the person against whom the claim is made, the name of the owner of the building and the situation of the building by its street and number, if the number be known. The said county clerk shall enter the particulars of such notice in a book to be kept in his office, to be called the "lien docket," which shall be suitably ruled in

* See Laws of 1870, ch. 529, and Laws of 1872, ch. 669, *ante*, p. 11, in regard to the time for filing liens in certain cases.

columns, headed "claimants," "against whom claimed," "owners," "building," "amount claimed," "date of notice," "hour and minute," and "what proceedings have been had." The names of owners and persons against whom the claim is made shall be inserted in alphabetical order. A fee of ten cents shall be paid to the county clerk on filing such lien.

A copy of said notice shall be served on said owner by delivering the same [to him] personally, or if he be out of this State, by delivering the same to his agent personally; and after such *service* such owner shall not be protected in any payments made by him to such contractor or other claimant in this section specified.

§ 4. In case the defendant or defendants shall not answer the plaintiff's complaint within the time, and as required by law, the plaintiff may apply to the court on proof of the service of the summons and complaint, and that no answer has been served, as required by the summons, for a writ of inquiry, and the same may be issued to the sheriff of the county in which the action may be brought to assess the amount of such claim, or the amount of such claim may be assessed by the court, and upon the return of the writ of inquiry or the assessment by the court, judgment shall be entered upon the same and execution shall issue for the enforcement of said claim so, adjudicated and established in the same manner as in analogous cases upon other judgments in such court.

§ 5. A transcript of every judgment rendered, headed "lien docket," shall be furnished by the clerk of the court to the successful party, who may file the same with the county clerk, whose duty it shall be to enter the name of the court and the amount of the judgment, or when the judgment is against the claimant, after the expiration of thirty days, if no appeal has been taken, the word "discharged," under the last head in his docket.

§ 6. Costs shall be allowed upon the same principles and by the same rules in the action as they are now allowed by statute in civil actions aforesaid, and shall form a part of the judgment, except in cases where the amount of the recovery is less than fifty dollars, no more costs than damages shall be allowed to the party recovering such judgment.

§ 7. The lien may be discharged as follows :

First. By filing a certificate of the claimant or his successors in interest, acknowledged or proved in the same manner as the satisfaction of a mortgage, stating that the lien is discharged.

Second. By the deposit with the clerk, if before suit, of a sum of money equal to the amount claimed, or, after suit, equal to such amount and the amount of costs incurred, which money shall thereupon be held subject to the lien.

Third. By an entry of the clerk made in the book of liens, after one year has elapsed since the filing of the claim, stating that no notice has been given to him of legal steps to enforce the lien.

Fourth. By an affidavit of service of a notice from the owner to the claimant, requiring him to commence an action for the enforcement of his lien, on or before a certain hour, on a day specified in said notice, and the lapse of thirty days thereafter without any affidavit from the claimant being filed of the issuing or service of the summons and complaint in an action for an enforcement of such lien.

Fifth. By the satisfaction of the lien, or a final judgment in an action for the enforcement thereof.

§ 8. Every lien created under this act shall continue until the expiration of one year from the creation thereof and until judgment rendered in any proceedings for the enforcement thereof.

§ 9. Whenever judgment shall be rendered in favor of the claimant in any proceeding commenced under this act, such judgment shall direct the sale of the interest of the owner in the land and premises upon which the lien exists, to the extent of the right of such owner at the time of the filing of the notice of lien in pursuance of this act, and that the proceeds of such sale shall be applied to the payment of the costs of the action and proceeding, and of the amount found to be due to such claimant or plaintiff, and that the residue of such proceeds be paid to the clerk of the court in which such action or proceeding may have been instituted, to abide the further order of the court.

§ 10. The owner may apply to the court for an order directing the clerk to pay him the surplus proceeds of such sale so paid to the said clerk, upon producing the certificate of the county clerk of the county or counties in which any portion of said land and premises may be situated that there are no liens docketed in his office against or affecting the said premises which have been filed under this act, and which remain unsatisfied.

§ 11. If it shall appear that there are other liens on file with the clerk of either of said counties affecting the said premises, notice of such application shall be given to the claimants respectively filing the notices creating such liens, and thereupon the said court shall distribute such surplus proceeds among the parties entitled thereto, according to their respective rights and priorities, and may order a reference to take proofs in relation to such rights and priorities.

§ 12. In all sales under judgments to be rendered in these proceedings, the interest of the owner shall be sold subject to all prior liens existing thereon, unless the claimants under such liens shall be made parties to the proceedings, in which case the courts shall settle the rights of the respective claimants, and the payment of the owner of any valid lien, or of any judgment recovered in pursuance of this act, shall enure to him as a payment to the amount thereof to the contractor, or sub-contractor, as the case shall be.

§ 13. When the action or proceedings are commenced by a person having a claim against a contractor, with the owner, or against a sub-contractor with the contractor or other sub-contractor, such contractor or sub-contractor may be made a defendant with such owner, and judgment may be rendered against the contractor or sub-contractor for the amount which shall be found owing by him, in addition to the judgment hereinbefore provided for against such owner, and the court may award costs against such of the parties as shall be just.

§ 14. Chapter three hundred and thirty-five of the Laws of eighteen hundred and fifty-three, entitled, "An Act for the better security of Mechanics and others Erecting Buildings, Performing Work or Furnishing Materials in the County of

“Kings,” passed June eighth, eighteen hundred and fifty-three, and chapter two hundred and four of the Laws of eighteen hundred and fifty-eight, passed April fourteenth, eighteen hundred and fifty-eight, so far as the same applies to the county of Kings and Queens, aforesaid, are hereby repealed.

§ 15. This act shall take effect immediately.*

OBSERVATIONS ON THE LAWS RELATING TO THE COUNTIES OF KINGS AND QUEENS.

Introduction.

900. As all the special statutes on this subject in this State are founded upon similar statutes, and the same principles of law are common to all, it will only be necessary to observe the *differences* in the language used in some of the statutes, as compared with those discussed in the preceding pages, in order to apply to *any special statute* the general principles of law there laid down. (See Preface and Introduction, *ante*.)

The preceding Act of 1862 is almost the same in every particular as the Acts of 1851 and 1855 relating to New York city. The differences are in sections one, two and four of the said Act of 1862.

Who may acquire a Lien—for what, and the time of perfecting it.

901. All of these questions under §§ 1 and 2 are the same as have already been discussed, with only *two* exceptions.

* All previous laws of this nature that were applicable to the counties of Kings and Queens, or some part thereof, were as follows: Laws of 1844, ch. 305, applied to city of Brooklyn and village of Williamsburgh; Laws of 1845, ch. 235; Laws of 1853, ch. 335, applied to the county of Kings; Laws of 1858, ch. 204, extending Laws of 1854, ch. 402, so that the latter applied to Kings and Queens counties. It was held, however, not to apply to the *city of Brooklyn*. (*Rafter vs. Sullivan*, 13 Abb., 262.)

902. *First*: A party who is *permitted* by the owner to do work or furnish materials can acquire a lien against such owner's interest (§ 1). This is something more than an *implied* contract, and is more effectual to cover all cases than the law for New York city, particularly as the latter law has been construed by the courts. Under this act a sub-contractor could recover in a case like *Walker vs. Paine* (2 *E. D. S.*, 662), and *Randolph vs. Garvey* (10 *Abb.*, 179), and should also reach the lessor's interest where he *permits* the lessee to make repairs or improvements that are a benefit to the lessor, as well as in cases where there is an executory contract to lease, or advance money, or sell the property, contingent upon the alteration or erection of buildings thereon. (See *ante*.)

As to an implied contract, &c., see *Story's Eq. Jurisp.*, § 1,237; *Hauptmann vs. Catlin*, 3 *E. D. S.*, 666; *Spencer vs. Barnett*, 35 *N. Y.*, 94; *Rollin vs. Cross*, 45 *N. Y.*, 766; *Meehan vs. Williams*, 36 *How.*, 73.

903. *Second*: The time of perfecting the lien is at any time within three months *after* the performance of the labor or furnishing of the material, &c. (§ 3). Under the Law of 1851, containing a similar provision, it was held that the lien could not be perfected until after the completion of the contract for the labor or furnishing of the materials for which a lien was sought. (*Jaques vs. Morris*, 2 *E. D. S.*, 639.)

904. This restriction is only upon the party who seeks a lien—it does not mean that a sub-contractor cannot file a lien for his work until after the contractor has completed his contract.

The Notice of Lien and Perfecting it.

905. The *form* of the *notice* of lien is the same as has already been discussed, with *one* exception—it need not be *verified* (§ 3).

906. The *owner* is the same as is stated *ante*, with *one* exception. In cases in which the owner has made an agreement to sell and convey the premises to the contractor or other person, such owner is deemed to be the owner until a deed is actually delivered so as to pass the title of the property (§ 1).

907. The notice must be *served* on the *owner*, as well as *filed*

in the county clerk's office in the county where the property is situated (§3).

908. The *service* must be personal by delivering a copy of such notice to said owner, or, if he is *out of the State*, by delivering the same to his agent personally (§ 3).

909. The notice may be filed *before* or *after* service on the owner, but the lien is not perfected until both are done (*Rafter vs. Sullivan*, 13 *Abb.*, 262), even if the lien is sought by a contractor only.

910. If the owner makes *bona fide* payments to the contractor, or his assignee, *after* notice is filed, but *before* the service, the owner will be protected in such payments (§ 3) as against a sub-contractor or person engaged by the contractor.

911. Under a similar provision of the Law of 1830 the Court of Appeals held that service on one joint owner was sufficient to acquire a lien. (*Mandeville vs. Reed*, 13 *Abb.*, 173.)

912. The *name* of the owner must be *correctly stated* (*Beals vs. Cong. B. J.*, 1 *E. D. S.*, 654), or it will be invalid, because it must be *served* on the person named as owner in the notice, and if no service is made it is invalid.

913. The interest of an equitable owner may be bound by the lien when he is named as owner (*Rollin vs. Cross*, 45 *N. Y.*, 766).

914. Naming *too* many persons as owners will not invalidate the lien if it contains the proper person (*Hubbell vs. Schreyer*, 14 *Abb.*, *N. S.*, 284; *Hauptman vs. Catlin*, 3 *E. D. S.*, 666).

915. The naming of a firm without stating the individual names of all of its members would probably be held good in cases where all the surnames appear, as it has been held that the service on one of a firm is sufficient under a similar statute. (*Ante*, 911.)

916. If the notice contained the names of some of the owners and not all of them, it would bind the proportionate interest of those named for their proportionate share of the debt.

917. The *name* of the contractor need not be stated at all when the notice is by a sub-contractor (*Lutz vs. Ey*, 3 *E. D. S.*, 621. See *Hauptman vs. Halsey*, 1 *E. D. S.*, 668).

It is better to state it according to the fact. (*Ante*, 140.)*

918. There is no provision in this act prohibiting or declaring the effect of an assignment of the contract or a payment under it by the contractor. Under the decisions (*cited ante*, 133 to 139), such a prohibition in the statute is of little value or importance.

Lien, on What and Extent.

919. The effect of the lien as to the owner of the property, and the extent of it, is the same as is stated *ante*, with perhaps one exception, it was held under a similar statute that the owner could not be made personally liable to a sub-contractor or other lienor unless he was liable by *direct contract* (*Ante*, 35, 676, *note and post*, 952.)

Continuance and Discharge of Lien.

920. The lien continues until the expiration of one year from the creation thereof, and if an action is commenced to enforce it, the continuance is until judgment is rendered in the action. (§ 8.)

921. As to the time when the year begins to run, that must be governed by the time of filing the notice (§ 7, sub. 3). The service of the notice on the owner is only for the purpose of preventing the effect of any payment he may afterwards make to the contractors, and not for the purpose of perfecting a lien against the premises. It may well be doubted whether it is necessary to serve the owner within the three months.

922. It is fully provided as to how the lien may be discharged (§ 7). It is the same in effect as the former law of 1851 (§ 11), relating to New York city, except in regard to depositing the amount. After action brought such deposit must include the amount of costs incurred up to the time of such deposit. The mode of arriving at the amount of such costs is not specified, but such discharge would be on notice of motion founded upon affidavits showing the state of the case, on notice to all the parties in the action, and an order obtained from the court

* A variance in the proof and any fact required to be stated in the notice is fatal to the lien. (*Ante*, 649).

fixing such amount, and directing the county clerk to accept such deposit, and discharge the lien as against the property.

923. Under § 7, subd. 3, the county clerk may, on his own motion, after one year from the time of filing the lien, make an entry that no notice has been given to him of legal steps to enforce the lien (*Mushlitt vs. Silverman*, 50 N. Y., 360; *Paine vs. Bonney*, 4 E. D. S., 734).

924. Under a similar statute (1851, § 11, subd. 3, relating to New York), the clerk required an affidavit that no action had been commenced to enforce the lien.

See that subdivision fully discussed in *Paine v. Bonney*, 4 E. D. S., 734.

925. Unless notice is given to the clerk that an action has been commenced within the year, an entry by the clerk that the lien is discharged because no action has been commenced is valid, and the lien will be discharged thereby (*Paine vs. Bonney*, 4 E. D. S., 734). For form of notice, see *ante*, 256.

926. The form of the notice of the action pending, or the time of the entry thereof, is not prescribed. It was held in *Paine vs. Bonney* (4 E. D. S., 734), that the entry could be made after the year had expired. This may well be questioned when the rights of an innocent purchaser may intervene. As between the parties to the action, notice could be effectually made after one year, as it is a kind of *lis pendens*.

927. In construing this act, the court said :

“Where the act declares, as it does, that the lien may be “discharged in any of the several methods, the happening of any “of the *events*, or the performance of any of the acts mentioned, “operate *per se*, as a discharge, without the necessity of further “acts by any person.” (*Mushlitt vs. Silverman*, 50 N. Y., 360.)

928. The entry by the clerk, as required by subd. 3 of § 7, that an action has been commenced, is the only effectual *lis pendens*. It should be given to the clerk within a year from the time of filing the notice of lien. (See *ante*, 926.)

929. The owner can require a claimant to commence an action within a specified time, however short, and on the claim-

ant's default thereof, and the lapse of thirty days after service of the notice, the lien will be discharged. (§ 7, *subd.* 4.)*

930. It is not necessary to commence the action within the time required by the owner. The claimant has thirty days after the *service* of the *notice*; then, if an action is not commenced, the lien may be discharged by the clerk, unless an affidavit from the claimant is filed with the county clerk of the issuing or service of the summons and complaint in an action for the enforcement of such lien.† (*Mushlitt vs. Silverman*, 50 *N. Y.*, 360.)

* *Owner's Notice requiring Lienor to commence Foreclosure of Lien, under § 7, subd. 4.*

SIRS,—You are hereby notified and required to commence an action on or before the 5th day of September, 1873, at 10 o'clock, A. M., for the enforcement of a mechanics' lien, filed the day of 187 , in the office of the clerk of the county of , at , for the sum of \$, the same being claimed to be due for work performed (or materials furnished) in the erection of a certain building known as (give description contained in the notice of lien), one John Jackson being therein named as contractor, and the undersigned as owner, and that if you fail to commence such action within thirty days after the service of this notice upon you, the said lien will be discharged.

Dated, Sept. 1st, 1873.

RICHARD ROW,
Owner.

By A. B.,
his Atty.

To JOHN DOE and JAMES SMITH,
Claimants.

† *Affidavits to Discharge Lien where no action has been commenced, as required by the Owner, under § 7, subd. 4.*

STATE OF NEW YORK, } ss.:
County of }

T. B., being duly sworn, says, that on the day of 1873, at , in the county of , he personally served the notice, a copy of which is hereunto annexed, upon A. . . . B. . . . , the claimant therein mentioned, by delivering the same to, and leaving the same with the said A. . . . B. . . . Deponent further says that at the time of such service, he knew the person so served to be the person mentioned and described in said notice as claimant therein, and the person to whom said notice was addressed.

Sworn to, &c.

T. . . . B. . . .

931. The *sufficiency* of the *issuing* in such case must be the same as would be necessary under the Code (§ 99), to prevent the Statute of Limitations from running against a debt, or service by publication commenced under § 135.

932. The issuing or service must be of the summons *and* complaint within the time required. The issuing or service of a summons will not be sufficient, because it does not appear thereby in any manner what the action is for. The summons may be served without the complaint, but the *complaint* must be served within the thirty days, and an affidavit must be filed of that fact, or the lien will be discharged as a matter of law, without any entry being made thereof by the clerk. (*Mushlitt vs. Silverman*, 50 N. Y., 360.)

933. An action commenced after the expiration of the thirty days after the service of the owner's notice, cannot be maintained on the lien where such fact is set up in the answer. (*Id.*)

934. Under the fourth subdivision of § 7, none but the *owner* can require a lienor to commence an action for the enforcement of a lien. A *contractor* cannot require a sub-contractor to commence proceedings to enforce the lien of the latter. (*Ante*, 264, *note.*)

935. But the court intimated that the contractor could require the owner to serve the notice on a sub-contractor, and on the owner's refusal to do so, the contractor might proceed

STATE OF NEW YORK, }
County of } ss.:

T.... B ..., being duly sworn, says that he is the person who is named as owner in the notice and affidavit of service thereof by T.... B...., hereunto annexed; that more than thirty days have elapsed since the service of the notice mentioned in said affidavit of T.... B...., and that no action or proceeding has been commenced against him to enforce the lien mentioned in said notice, and that thirty days have elapsed since the said service of said notice, and that an affidavit from the said claimant or his attorney has not been filed in the office of the clerk of the county of of the issuing or service of the summons and complaint in an action for the enforcement of said lien, as appears by the certificate of the said county clerk.

Sworn, &c.

T.... J....,
Owner.

against the owner, as if no lien had been created. (*Butler vs. Magie*, 2 E. D. S., 654.)

936. The contractor could at any time commence an ordinary action against the owner for the amount due him, and the owner could not set up as a defense thereto, that liens were filed against his property for work done under the contractor's authority. (*Ante*, 659.)

937. When a *judgment* is against a claimant, the lien cannot be discharged until after the expiration of thirty days, and then, if no appeal has been taken from such judgment, the clerk may discharge the lien on his docket. (§ 5. *See post appeal.*)

Time and Manner of Enforcing Liens, and Jurisdiction of Courts.

938. At any time after the perfecting of the lien, before the expiration of the year, unless sooner required by the owner (§ 7, sub. 4), the claimant may enforce or bring to a close such lien by a civil action in a court of record, in the city or county in which such lands, or any portion of them, may be situated (§ 2, sub. 1).

939. The manner of commencing the action is by summons, as in other actions, and the pleading, the issues and the evidence and trial, is the same as in other actions (§ 2, sub. 3 and 4).*

940. This act does not extend the jurisdiction of county courts as to the residence of the defendants or the amount claimed in these actions, under this statute, to wit, one thousand dollars. The limit of the jurisdiction of county courts, as to the amount of the relief demanded in civil actions, other than those specified by statute, is the same in these actions as in other actions not specified by statute. (*Code*, § 30, Laws 1870, ch. 467 ; Amd. Const. of 1869, § 15.)

941. County Courts have the same jurisdiction in certain proceedings as the Court of Common Pleas had under the Constitution of 1821. (*Code*, §§ 29, 30, sub. 11 ; Const. 1846,

* In the City Court of Brooklyn, in actions to foreclose Mechanics' Liens, under this statute, issues of fact must be framed (under Rule 40 of Supreme Court), and they are determined by a jury. In other courts in Kings county they are generally referred.

art. 6, § 15; *Munroe vs. Munroe*, 27 *How.*, 208; *Laws* 1847, ch. 280, § 36.)

942. The law of 1845 (ch. 235), so far as the same may be applicable to the counties of Kings and Queens, has never been repealed, and is as follows :

“ § 1. The docket of liens and of judgments filed and docketed with the county clerk of any county, under chapters two hundred and twenty and three hundred and five of the Laws of 1844, shall be subject to the control and jurisdiction of the Court of Common Pleas, in such county, in the same manner as judgments recovered in said court.

“ § 2. This act shall take effect immediately.”

Parties to the Action—Modes of Trial.

943. It is not necessary that any *prior* or *subsequent* lienors, or the contractor or sub-contractor should be made parties defendant with the owner; it was so held under the law of 1851. (*Ante*, 268, note.)

944. By making *prior* lienors or incumbrancers parties, their rights could be ascertained (§ 12), and by making a contractor or a sub-contractor a party, a personal judgment may be obtained against them. (§13. *Id.*)

945. Under the law of 1851, the court said “That in many instances it may become necessary, in proceedings under the statute authorizing these liens, to bring before the court all parties who are interested, in order that a final determination of the matters in controversy may be made, and a distribution of the fund ordered.” (*Chamberlain vs. O'Connor*, 1 *E. D. S.*, 665.)

946. The only way that lienors can contest among themselves is by cross-action, by original process (*Westervelt vs. Levy*, 2 *Duer*, 354), or by a bill of interpleader in some instances. (*Lehretter vs. Koffman*, 1 *E. D. S.*, 664; *Chamberlain vs. O'Connor*, 1 *E. D. S.*, 665.)

947. No express mention is made in the act of the *abandonment* of the contract by the contractor without cause, and the effect of it as to the sub-contractor. A contractor cannot in such case recover.

948. Under the law of 1851-55 it was held that a *sub-contractor* could not obtain a lien in such case. (*Denniston vs. McAllister*, 1 *E. D. S.*, 729; *Randolph vs. Garvey*, 10 *Abb.*, 179; *Cunningham vs. Jones*, 3 *E. D. S.*, 650.)

949. The statute gives a sub-contractor a lien in certain cases and to a certain extent (§ 1). Under it the *sub-contractor* should recover from the owner when the contract has been abandoned by his contractor, even without cause, to the full and fair value of the work or materials permitted by the owner to be placed upon his land to the same extent as if the contractor had carried out his contract. (*Ante* the contract.)

950. Contracts are seldom abandoned without such cause as will prevent a sub-contractor acquiring a lien under this act.

951. In case the defendant or defendants do not appear, the mode of proceeding is fully provided and prescribed in § 4, and is the same as is prescribed in the Code, § 246, sub. 2.

952. There is no express provision in the act requiring the court to render a *personal judgment* against the owner, where he is not liable to the lienor by *direct contract*. It was held, under the law of 1851-55 (*ante*, 676, *note*), that, without an express provision to that effect no personal judgment could be rendered against the owner in such case. There is not now, and was not, under the law under which these decisions were rendered, any foundation for any such decision, while there is every reason why it should have been decided that the owner was personally liable to the lienor for the amount due from the owner to his (the owner's) contractor. (See *ante*, 580, 676, *note*.)

The same court took so narrow a view of the law as to doubt the propriety of rendering a *personal judgment* against an owner for any *deficiency*, even when he was *liable by direct contract*! (*Quimby vs. Sloan*, 2 *E. D. S.*, 594.)

953. A personal judgment may be rendered against an *equitable owner* where he is a party joined with the legal owner in certain cases. (*Hallaghan vs. Herbert*, 11 *Abb.*, *N. S.*, 326; *Rollin vs. Cross*, 45 *N. Y.*, 766.)

954. *Costs* are the same as in other equity actions, excepting that when the amount of the recovery is *less than fifty dollars*,

no more costs than damages can be allowed to the party receiving such judgment (§ 6), and in other cases the court may award costs against such of the parties as shall be just (§ § 13, 2, *subd.* 4).

955. The *form* of the judgment in favor of a claimant is required by the statute (§ 9) to be the same as was required by the Law of 1855, relating to N. Y. city. (See *Althause vs. Warren*, *ante*, 735 *note*, where a proper form of judgment under that law is given; see also *ante*, 844 *note*.)

956. The execution in such case is merely giving the sheriff a certified copy of such judgment, and directing him to proceed under it. (*Ante*, 845.)

957. The disposition of the proceeds of the sale under the judgment and *after the sale* is the same as in cases of foreclosure of a mortgage. (§§ 9, 10, 11, *Supreme Court*, *rules* 73, 77.)

958. The *payment* by the owner of any valid *lien* or of any *judgment* recovered in pursuance of this act, shall enure to him as a payment to the amount thereof to the contractor or subcontractor, as the case may be. (§ 12.)

Appeals and their Effect, and the time to take them.

959. All of these questions are the same in these proceedings as under the Code. (§ 2, *Hallaghan vs. Herbert*, 11 *Abb. N. S.*, 326.)

960. When the owner appeals from a judgment, if he requires a stay of proceedings, he must give the same security as is required in a judgment of foreclosure of a mortgage. (*Code*, §§ 338, 348.)

961. If no notice of appeal is served by the claimant, when the judgment is in favor of the owner, within thirty days after the notice of entry of judgment, on filing a transcript thereof, the clerk must mark the *lien* as discharged on his docket. (§ 5, *Sullivan vs. Brewster*, 1 *E. D. S.*, 681.)

962. The *effect* of the *service* of the notice of appeal by the claimant, within thirty days after the judgment, would prevent the clerk from making the entry of a discharge of the *lien*, without an order of the court.

963. The entry of the notice of the commencement of the action to enforce the lien under §7, *subd.* 3, would still be constructive notice to all of the pendency of the appeal. (See *Hallaghan vs. Herbert*, 11 *Abb. N. S.*, 326.)

PART V.

FORMS.

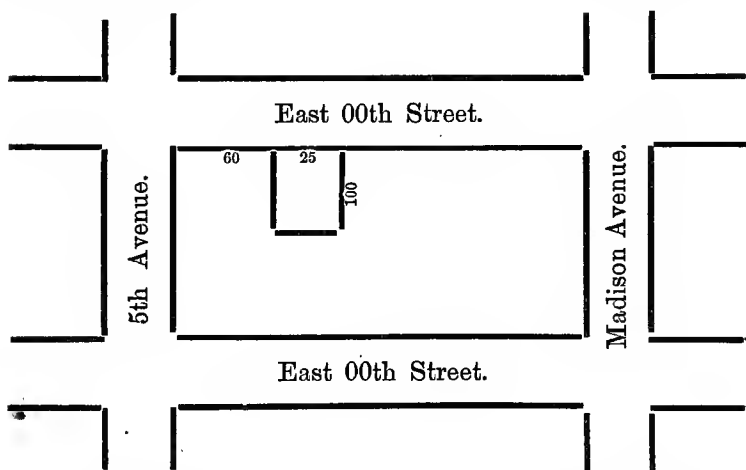
Notice of Claim.

No. 1.

To Charles E. Loew, Esq., Clerk of the City and County of N. Y.:

Sir—Take notice that we, William Wood, residing at No. _____ street, in _____ and John Mason, residing at No. _____ street, in _____ have a claim against John Doe, debtor, amounting to the sum of \$5,000, due to us on the 1st September, 1873, and that the said claim is made for and on account of work, labor and materials furnished by us to said Doe, and that such work, labor and materials were so furnished in pursuance of a contract or employment to build, alter or repair certain premises and the appurtenances, which, upon information and belief, claimants state is owned by Richard Row, and is situated in the 19th ward of New York city, on the northerly side of East 00th street, and is known

as No. (or No. unknown). The following is a diagram of said premises :



And that we have and claim a lien upon said house or building and the appurtenances, and upon the lot on which the same stands, pursuant to the provisions of an act of the Legislature of the State of New York, entitled "An Act to secure the payment of mechanics, laborers and persons furnishing materials towards the erection, altering or repairing of buildings in the city of New York," passed May 5th, 1863, and of the acts amending the same.

Dated New York, August 30th, 1873.

WOOD & MASON, Claimants,
By John Mason.*

Verification to Notice.

No. 2.

State, City and County of New York, ss :

John Mason, being duly sworn, says : That he is one of the claimants above named, and who subscribed the foregoing notice, and that the contents of said notice is true of his own

* See form of notice, *ante*, 145, *note*.

knowledge, except as to the matters which are therein stated to be upon information and belief, and as to those matters he believes it to be true.

JOHN MASON.

Sworn and subscribed before me, }
this 30th day of August, 1873, }

Verification by Illiterate Person.

No. 3.

City and County of New York, ss :

The claimant C D, not being able to read or write, G H was duly sworn : That he had read to the claimant truly and correctly the foregoing notice, and that he appeared perfectly to understand the same, and that the said C D had affixed his mark thereto in his presence, and the said C D was thereupon sworn that he had heard the said notice, so subscribed by him with his mark, read and knows the contents thereof, &c., as in No. 2. (1 *Barb.*, Ch. 155 ; 2 *Barb.*, Ch. 416 ; see also 1 *Abb.*, *Forms* p. 5.)*

Notice to Foreclose Lien.

No. 4.

WILLIAM WOOD and JOHN MASON,
Claimants,

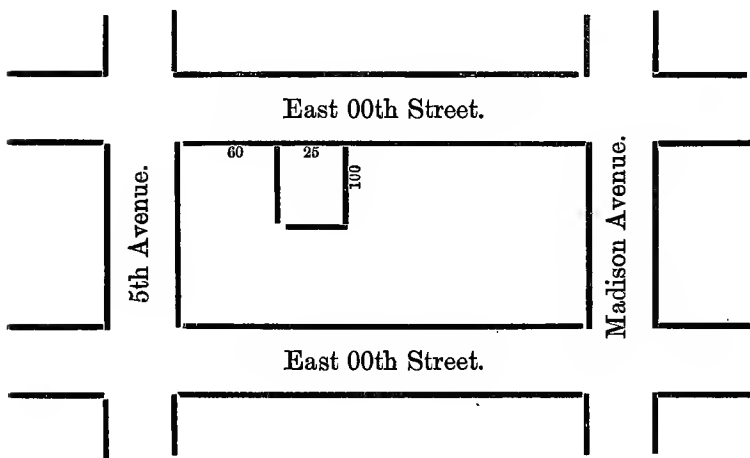
against

RICHARD ROW, JOHN SHARP, S.
Carpenter, James Murphy, and
T. Drew.

Take notice that we, the subscribers, on the 30th day of August, 1873, filed in the office of the clerk of the city and

* See other forms of verification referred to, *ante*, 172, 173 and 176.

county of New York the notice required by law to perfect a lien for the sum of \$5,000, John Sharp, debtor, upon the house or building and the appurtenances thereto, and lot on which the same stands, situate in the 19th ward of said city, on the northerly side of East 00th street, and is known as No. (or No. unknown), owned by Richard Row, and described in the following diagram :



The following are liens, and the times of filing the same, affecting the same premises: September 5, 1872, John Sharp for \$2,500, Richard Row, debtor; September 15, 1873, James Murphy for \$75, John Sharp, debtor; October 1, 1873, S. Carpenter, for \$1,350, Wood and Mason, debtors. T. Drew, mortgagee for \$7,000, recorded September 14th, 1873.

You are hereby required to appear in the Court of Common Pleas for the city and county of New York, at a Special Term thereof, to be held at the chambers of said court, in the court house in said city, on the 19th day of October, 1873, at 11 o'clock in the forenoon of that day, and submit to an accounting ^{and} enforcement of the amounts due or ~~to be~~ ^{to} paid to

be due on said liens, pursuant to the act in such case made and provided.

Dated October 8th, 1873.

Yours, &c.,

WILLIAM WOOD and JOHN MASON,

By JOHN SMITH, their attorney,

111 Broadway.

To RICHARD ROW, owner; JOHN SHARP,
contractor; S. CARPENTER, JAMES
MURPHY, T. DREW, mortgagee.

Order for Issues.

No. 5.

At a special term of the Court of Common Pleas,
for the city and county of New York, held in
the Court House in said city, on the 19th day of
October, 1873.

Present Hon. H. W. ROBINSON, presiding.

WILLIAM WOOD and JOHN MASON, Claimants,
--

agst.

RICHARD ROW, JOHN SHARP, S. Carpenter, James Murphy, and T. Drew.

On reading and filing the notice of William Wood and John Mason, dated October 8th, 1873, to the defendant to appear and submit to an accounting enforcement of the amount claimed by the various notices of liens now on file against certain property, all of which is described in said notice: Now on motion of John Smith, attorney for said Mason & Wood,

plaintiffs, the defendants Richard Row and John Sharp, appearing by J. Stiles, their attorney, and defendants S. Carpenter and James Murphy, appearing by A. Wells, their attorney, and the defendant T. Drew, not appearing, and on proof of due service of said notice on said T. Drew, it is hereby

Ordered, that the issues between said parties abovenamed, who have appeared, be joined by the claimants William Wood and John Mason, serving a complaint upon the attorneys who have appeared herein as in an ordinary action, within ten days hereof, and that the defendants in like manner may serve a copy of their claim or answer or demurrer or objection thereto, within twenty days after the service of said complaint, and any party whose interests are to be affected by the claim of any other party, must be served with such claim within five days, and the same may be answered within ten days thereafter; the bill of particulars of the claims of any party to be served as in other actions. After issue joined this action, proceed according to the statute in such case made and provided.

Enter.

H. W. R.

Owner's Notice to Foreclose Lien.

No. 6.

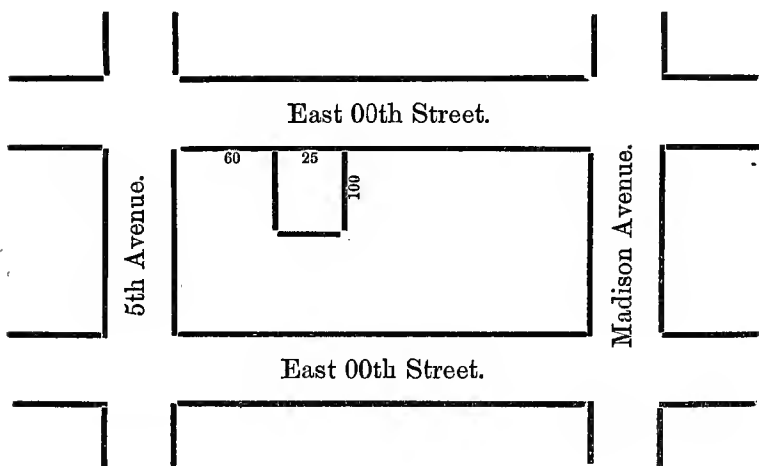
RICHARD ROW,
Owner,

agst.

WILLIAM WOOD, JOHN MASON, JOHN
Sharp, James Murphy, and S.
Carpenter.

Take notice that I am the owner of the house and premises situate in the 19th ward of the city of New York, on the

northerly side of East 00th street, and described in the following diagram :



The following are the liens and the times of filing the same affecting said premises: August 30, 1873, William Wood and John Mason for \$5,000, John Doe, debtor; September 3, 1873, John Sharp for \$2,500, Richard Row, debtor; September 15, 1873, James Murphy for \$75, John Sharp, debtor; October 1, 1873, S. Carpenter for \$1,350, Wood & Mason, debtors.

You are hereby required to appear in the Court of Common Pleas for the city and county of New York, at a special term thereof, to be held at the chambers of said court in the Court House in said city, on the 29th day of October, 1873, at 11 o'clock in the forenoon of that day, and submit to an accounting enforcement of the amounts claimed to be due on said liens, and show cause why said premises should not be discharged therefrom, pursuant to the act in such case made and provided.

Yours, &c.,

RICHARD ROW, owner,

By J. STILES, his attorney.

To

&c., lienors.

* See form for owner's notice, under the statute relating to Kings and Queens counties, *ante*, 929, *note*.

*Complaint by Sub-contractor.***No. 7.**

TITLE OF ACTION.

The claimants, Wood & Mason, as plaintiff (pursuant to an order of this court, made and entered herein on the 19th day of October, 1873), for their complaint allege :

1. That at all the times hereinafter mentioned the defendant Richard Row was, and still is, the owner of a certain house and lot known as No. on East 00th street, New York city, which is hereinafter more fully described.

2. That on or about the day of , 1873, the defendant John Sharp (under the name of John Doe), employed these plaintiffs to perform the carpenter work, and furnish materials (set forth contract) on and about the erection or altering or repairing of the building before mentioned, and that at various times between the 1st day of May, 1873, and the first day of September, 1873, these plaintiffs did so furnish carpenter work and materials on and about the erection (or alteration or repairing) of said building, and that the same was pursuant to an agreement between the said owner and the said John Sharp.

3. That on the 30th day of August, in order to perfect a lien upon said premises, these plaintiffs duly filed in the office of the clerk of the city and county of New York, a notice of lien upon said premises for the indebtedness aforesaid, which notice was duly verified, and specified the amount of plaintiffs' claim as above stated, and how the same accrued, and also specified the defendant Richard Row as the owner of said premises, and stated that the amount of said claim was due to these plaintiffs from John Doe, who is the same person named herein as John Sharp, and described said buildings by the street number (or otherwise) and as located in the 19th ward of the city of New York.

4. That said sum of \$5,000 is now due us, these plaintiffs as aforesaid, from said John Doe, alias John Sharp, and interest thereon from September 1st, 1873 ; that payments are due from

said Richard Row to said John Sharp, pursuant to contract between them. (See 1 *Daly*, 61.)

5. That the following are other liens and incumbrances that appear to be upon said premises, and the times when they were perfected : John Sharp, lien filed September 3, 1873, for \$2,500, Richard Row, debtor ; James Murphy, lien filed September 15th, 1873, for \$75, John Sharp, debtor ; S. Carpenter, lien filed October 1st, 1873, for \$1,350, Wood & Mason, debtors ; T. Drew, mortgage recorded September 14th, 1873, for \$7,000.

6. The following is a description of said premises.

(State metes and bounds.)

Wherefore the plaintiffs demand that an accounting be had between the respective parties herein, and that the amount due to each, and from whom, be ascertained, and that a decree be granted directing the sale of all the right, title and interest which the said Richard Row had in and to the said building, appurtenances and lot, at the time of the filing of plaintiffs' lien or any lien thereon as aforesaid, and that out of the proceeds thereof, these plaintiffs be paid the amount of their said lien, together with the interest thereon and costs of this proceeding, and that these plaintiffs have judgment against said John Sharp for the amount of said claim and interest and costs as aforesaid, and judgment against said Richard Row for any sum due from him to said John Sharp, or so much thereof as will be sufficient to satisfy plaintiffs' claim against said Sharp and costs of this action, and for such other or further or different relief in the premises as the court shall be competent to grant.

Atty. for Plffs.

When Deposit made Complaint should conclude as follows :

No. 8.

7. That after the notices of liens aforesaid were filed, to wit, on the 1st day of October, 1873, before the commencement of this proceeding, the said Richard Row

duly deposited the sum of _____ dollars, the amount of the said liens aforesaid, and interest thereon, to the credit of said liens on said premises, with the clerk of the city and county of New York, and said liens were duly discharged by a proper entry on the docket of said liens, stating such fact as aforesaid.

Wherefore the plaintiffs demand that an accounting be had between the said Richard Row, the owner, and the said defendants, and that the amount due to the respective parties be ascertained, and that the clerk of the city and county of New York be directed to pay to these plaintiffs the amount in his hands, which was deposited by said Richard Row to the credit of the said lien of these plaintiffs, and that these plaintiffs have judgment against said Richard Row and John Sharp for the sum of \$5,000 and interest from _____

, together with the costs of this proceeding, and for such further or different relief in the premises as the court shall be competent to grant.

Plffs' Atty.

Affidavit for Continuance of Lien.

No. 9.

(If made after action commenced, it should be entitled in the action.

If made before action commenced, it should be entitled :

"In the matter of the application for the continuance of the notice of lien of James Sullivan against the premises known and described as

in New York city, Richard Row, owner," and should be addressed to the court where the application is made.)

City and County of New York, ss :

James Sullivan being duly sworn, says : That he is the claimant above mentioned ; that on the _____ day of _____, 1873, he filed (or caused to be filed)

in the office of the clerk of the city and county of New York, a notice of lien upon certain property in said city, known and described as _____, for the sum of _____ . A copy of said notice of lien is hereunto annexed, marked A.

Deponent further says: That an action to enforce the liens upon said property has been duly commenced, and is now pending in this court, and is still undetermined, and that said notice of lien, if not continued by an order of this court, will expire on the _____ day of _____, 1873, under the statute.

JAMES SULLIVAN.

Sworn to before me, &c., }

Order Continuing Lien.

No. 10.

At a special term of the Court of Common Pleas for the city and county of New York, held in said city on the _____ day of _____, 1873.

Present—Hon. R. L. LARREMORE, Judge, presiding.

(Title same as in affidavit.)

On the annexed affidavit of James Sullivan, and on motion of _____, counsel for said lienor above named, it is hereby

Ordered, That the notice of lien of James Sullivan heretofore filed on the _____ day of _____, 1873, in the office of the clerk of the city and county of New York, for the sum of _____ dollars, upon certain property in said city, known and described as (same as in notice of lien), and owned by Richard Row, be, and the same is hereby continued and renewed for the period of one year from the entry of this order, unless sooner discharged by judgment, and the said

clerk of the city and county of New York is hereby directed to make the proper entry of continuance and renewal of said lien upon the lien docket of said lien in his office.

(Copy.)

N. JARVIS, Jr.,
Clerk.

*Affidavit to Discharge Lien after One Year, and no Action has been commenced to Enforce Liens. **

No. 11.

In the matter of the application for the discharge of record of the notice of lien of _____ against the premises described as (same as in notice of lien) and Richard Row, owner.

To the Court of Common Pleas for the City and County of New York:

City and County of New York, ss.:

Richard Row, being duly sworn, says that he is the owner of the premises described as (same as in notice of lien); that on the _____ day of _____, 1873, one _____, as claimant, filed, or caused to be filed, in the office of the clerk of the city and county of New York a notice of lien upon said property in said city described as _____ for the sum of _____ dollars due him from _____. A certified copy of said notice of lien is hereunto annexed, marked "A."

Deponent further says that no action or proceeding has been commenced, to the knowledge of this deponent, to enforce said lien against said property, and that more than one year has elapsed since the filing of said notice, and that the same

* The form of the affidavit of the owner to discharge lien where no proceeding has been commenced for the enforcement thereof, as required by the owner pursuant to § 7, subd. 4, under the law relating to Kings and Queens counties, may be found *ante*, 929, note.

has not been continued or renewed by the order of any court or otherwise, to the knowledge of this deponent, and that said lien has expired by lapse of time.

RICHARD ROW.

Sworn to before me, this }
 day of , }

Clause in No. 11.—When Money Deposited.

No. 12.

Deponent further says that on the day of , 1873, in order to discharge said lien as against said property, deponent deposited with the clerk of the city and county of New York the sum of dollars, being the amount claimed in said notice and interest thereon, and the sum so deposited by deponent was credited to said lien, and the same was discharged as against said property, and that said sum so deposited is still in the hands of the clerk of the city and county of New York, as deponent has been informed by said clerk, and as appears by his certificate herewith exhibited.

*Order Discharging Lien.—No Action Commenced.**

No. 13.

(Title as in preceding affidavit.) At a special term, &c.

On the annexed affidavit of , and on the certificate of the clerk of the city and county of New York, that

* The form of the proceedings for the discharging lien, where no proceeding has been commenced and no affidavit filed of the issuing or service of the summons and complaint in an action for an enforcement of the lien, as required by the owner pursuant to § 7, subd. 4, under the law relating to Kings and Queens counties, may be found *ante*, 929, *note*.

more than one year has elapsed since the filing of the notice of lien mentioned in said affidavit, and that the said lien has not been continued or renewed by any order of court or otherwise, and that no notice of any proceeding to enforce said lien has been filed with him: now, on motion of _____, of counsel for _____, it is hereby ordered that the notice of lien filed by _____ on the _____ day of _____, 1873, for the sum of _____ dollars on the property known and described as (same description as in notice of lien) and owned by Richard Row be, and the same is hereby, discharged as a lien, and the clerk of the city and county of New York is hereby directed to make the proper entry of discharge of said lien upon the lien docket of _____ said lien in his office.

(Copy)

N. JARVIS, JR.,
Clerk.

Clause in No. 13.—When Money Deposited.

No. 14.

And the clerk of the city and county of New York is hereby directed to pay over to _____ (or his attorney or assignee) the sum of money now in his hands deposited on the _____ day of _____, 1873, by said _____ to the credit of said lien of _____, less his fees.

Petition to be Made Party.

No. 15.

In the matter of the petition of C——— D———, to be made a party defendant in a proceeding now pending in this court in Mechanics' Lien proceedings, in which A——— B——— is plaintiff, and F——— G——— and others defendants.

To the Court of Common Pleas for the City and County of New York:

The petition of your petitioner, C—— D——, shows to this court: That a proceeding is now pending in this court by A—— B——, plaintiff, against F—— G—— and others, defendants, for the enforcement and accounting of mechanics' liens filed upon certain property (describe same as in the notice of lien), which proceeding your petitioner is informed and believes (is at issue but) has not proceeded to judgment.

That Y———Z——— was a sub-contractor and employed by your petitioner to do certain work upon said property at a certain sum therefor; that said Y———Z——— abandoned the work and did not complete the same as he agreed, and claims more than he is entitled to for his work under said contract.

Wherefore your petitioner prays that he may be made a party in said proceeding and may be allowed to defend against the claim of said Y———Z———, and that he may have such other relief as may be just.

(Signature.)

Dated _____, 1873.

(Verification as stated, *ante*, 170.)

Order Making Party Defendant.

No. 16.

At a special term, &c.

(Title of action.)

On reading and filing the petition of C D, dated the day of _____, 1873, and on motion of O P for said C D, and after hearing Q R in opposition, it is hereby

Ordered that C D be made a party defendant herein, and the complaint be amended accordingly (and that the plaintiff have leave to amend them in other respects as he may be advised);

and that on said C D causing a notice of appearance for himself herein to be given to plaintiff's attorney within five days from the service of this order; a copy of the complaint as amended be served upon his attorney within ten days thereafter, and the said proceeding thereupon proceed in the same manner as if said C D had been originally made a party herein.

Affidavit to obtain Summons under § 5.

No. 17.

(Title of cause.)

State, City and County of New York, ss. :

T F, being duly sworn, saith, that he is attorney for the plaintiff in above entitled proceedings; that the same is now pending for the purpose of the enforcement and accounting of mechanics' liens filed against the property known (describe as in notice of lien) in New York city and is owned by the defendant, H J, and that issue has been joined and the same has been referred to Thomas H. Landon, Esq., to hear, try and determine all the issues therein; that since the commencement of the said proceedings herein, one T S, on the day of September, 1873, filed in the office of the clerk of the city and county of New York a notice of lien against the said property for the sum of \$500, which he claimed to be due him from G H, and deponent believes that it is necessary and proper that said T S have notice of this proceeding, pursuant to law.

Sworn to before me,

}
}

*Summons under § 5.***No. 18.**

(Title of cause.)

You are hereby summoned to appear before Thomas H. Landon, Esq., referee in above entitled proceeding, on the day of September, 1873, at 2 o'clock P. M., at the clerk's office of the Court of Common Pleas, in the Court House, New York city, and show cause why you should not be bound by any judgment that may be rendered in the above entitled proceedings, which are now pending in the matter of the enforcement and accounting of mechanics' lien filed against the property (describe as in notice of lien), in the same manner as if you had been originally notified thereof, and if you fail to show cause as aforesaid, or to serve notice of your claim against

, debtor, under a notice of lien filed by you on said property on the day of September, 1873, for the sum of five hundred dollars, and then appear to establish the same, you will be bound by the judgment to be rendered therein.

R. L. LARREMORE,
Judge N. Y. C. P.

Dated Sept.
To T S.

*Notice under §§ 4 and 5.***No. 19.**

(Title of cause.)

To T S:

You are hereby notified to appear before Thomas H. Landon, Esq., referee in above entitled proceeding, on the day of September, 1873, at 2 o'clock P. M., at the clerk's office of the Court of Common Pleas in the Court House, New York city, pursuant to the summons and complaint herewith served upon

you pursuant to § 5 of the Act of 1863, relating to proceedings in the enforcement of mechanics' liens.

And in default thereof, you will be bound by the judgment to be entered in said proceeding.

T. F.,
Plff's Atty.

Dated New York, Sept., 1873.

Order Bringing in Necessary Party.

No. 20.

At a special term, &c.

(Title of the cause.)

This cause coming on to be tried, and it appearing to the court that the presence of H F is necessary to a complete determination of the controversy, it is hereby

Ordered that the complaint in this action be amended by the addition of H F as a defendant therein; that the plaintiff cause the said H F to be duly served with a copy of the said complaint as so amended, and further amended if he be so advised within ten days after the service of this order; that the said H F have ten days to answer the complaint after such service, and that the trial of this cause be postponed until the action is in readiness to be brought to trial against said H F.

Bill of Particulars.

No. 21.

(Title of cause.)

Take notice that the following is the bill of particulars of the claim of _____ against _____, debtor, and

the property (describe as in notice of the pleading)* owned by
 , as claimed in above entitled action :

Dates.	Nature of Work or Materials and Items.	Value.
	Total	

(If the pleading or claim which it represents is verified,
 the bill of particulars should be verified.)

County Clerk's Certificate.

No. 22.

COUNTY CLERK'S OFFICE, }
 City and County of New York, } ss. :

WILLIAM WOOD AND JOHN MASON,
 Claimants,

against

JOHN DOE.

I, Charles E. Loew, clerk of the county of New York, do hereby certify that the mechanics' lien for \$5,000 dollars filed in my office on the day of , 1873, by William Wood and John Mason, claimants, against John Doe, debtor,

* See good form of Bill of Particulars in *Donnelly vs. Libby*, 1 *Sweeny*, 259.

Where work has been done or materials furnished on several different houses under one contract, the bill of particulars should show the particular house where any such work or materials were furnished. It may be necessary to furnish a separate bill of particulars as to each house. (See *ante*, 665, 666.)

against property situated on the south side of East 00 street, commencing about 60 feet easterly from the south-east corner of 5th avenue and East 00 street, known as No. (or No. unknown), running easterly 25 feet was discharged on the day of , 1873.

Clause in No. 22.—When Money Deposited.

No. 23.

It should continue as follows: by the deposit of the amount of the claim in the notice of lien, and interest thereon, with the county clerk, and that the amount so deposited is still in the custody of said clerk, credited to said lien.

Clause.—When Lien has been Continued by Order of the Court.

No. 24.

And further, that an order of the Court of dated , 1873, continuing said lien, was filed June , 1873.

(See *ante*, 567.)

Clause When Lien has Expired by Limitation.

No. 25.

That more than one year has elapsed since the filing of said notice of lien, and that no order has been filed requiring the same to be continued, and that no entry of the continuance of said lien has been made on the docket thereof.

In witness whereof, &c.

[L. S.]

*Referee's Report on the Issues of Fact.***No. 26.**

(Title of Cause.)

To the Court of Common Pleas of the City and County of New York :

I, Thomas H. Landon, to whom (by an order of said court, entered on the day of September, 1873) the issues in the above entitled action was referred, to hear, try and determine the same and report to this court, do now respectfully report :

That I have been attended by the lienors (naming them) and their respective counsel, and have also been attended by , the alleged contractor and his counsel, and by , the alleged owner and his counsel, and having heard the several allegations, claims, proof and arguments of said lienors and claimants and alleged owner, and having duly considered the same, I find, as matters of fact :

First.—That the defendant Richard Row, at the several times hereinafter mentioned, was the owner of the premises and house then in course of, or in contemplation of, erection, known as No. street, in the city and county of New York, and that he employed the defendant, John Sharp, as contractor to do thereon, among other things, the certain work by the lienors and claimants specified, to wit (furnished a large quantity of lumber, stone and lime, and masons' labor and carpenters' labor thereon) ; and that said Sharp, in accordance with the terms of said contract with said owner, employed the defendant , as sub-contractor, to do, among other things therein, the certain work (or furnish materials) hereinafter mentioned.

Second.—That the said afterwards engaged on or before the September, 1873, to do certain carpenter work (or furnish lumber or other material) upon and about said house and premises, in accordance with and pursuant to the terms of said contract with said the owner, and the contractor, and the sub-contractor.

Third.—That on the _____ day of September, 1873, the claimant _____ personally commenced said carpenter work (or furnished material) upon said house as aforesaid, and continued the same up to the _____ day of _____ 1873, and during said time worked _____ days, which said work was worth and of the value of three dollars and fifty cents per day, amounting in all to the sum of _____

(Where there are successive liens by the contractor, subcontractor, workman, person or persons furnishing materials, and of a number of liens in favor of different persons, the findings of fact must be specific as to the nature and kind of labor and materials furnished, so that they may be marshalled under § 3, or otherwise. See *ante*, 665, 666, 667.)

Fourth.—That on the _____ day of _____ 1873, at 11 o'clock, 50 minutes, A. M.,* a notice of lien was duly filed in the office of the clerk of the city and county of New York, in the name of _____ as claimant, against the said _____ as debtor, and against the premises hereinafter described, and said _____ as owner, for the sum of _____ dollars, a copy of which said notice, and the endorsement thereon, is hereunto annexed, marked A.

The following is a description of said premises :

Clause—When Money Deposited.

No. 27.

Fifth.—That before the commencement of these proceedings (or after the commencement of these proceedings, pursuant to an order of this court, duly entered on the _____ day of _____ 1873), the said _____, on the _____ day of _____ 1873, duly deposited with the clerk of the city and county of New York the sum of _____, to the credit of said lien of _____, and said lien was thereupon duly discharged as a lien upon said premises, by a proper entry made on the docket of said lien, stating such fact of said deposit

* The hour and minute of the filing of the notice may be very important. It was in *Quimby vs. Sloan*, 2 E. D. S., 594.

Clause—When Lien has been continued by order of the Court.

No. 28.

Sixth.—That on the day of , 1873, said lien of was duly continued for one year, by an order of court, and the proper entry made on the docket thereof, on that day, stating such fact, and that the same is now a valid and subsisting lien upon said property (or the sum of money so deposited as aforesaid, and now in the hands of the clerk of the city and county of New York).

Clause—When more than one year has elapsed since the filing of the lien, and the same has not been continued by order of the Court.

No. 29.

Seventh.—That more than one year has elapsed since the filing of said notice of lien, and that said lien has not been continued by the order of the court, and that an entry of the continuance of said lien has not been made on the docket of said lien.

Clause—In favor of Owner and against Contractor.

No. 30.

That at the time of the filing of the notice of lien by said as aforesaid, the said , owner, had paid , his contractor, the sum of dollars, in full for the matters set forth by the claimant herein, and that said property should be exempt from said lien.

Clause—Against Contractor.

No. 31.

That the defendant , the contractor (or subcontractor), is indebted to the claimant for the work (or materials furnished), pursuant to said contract with the said the contractor (or sub-contractor), in the sum of dollars.

*Clause against Owner and Contractor.***No. 32.**

Eighth.—That at the time of the filing of said notice of lien the sum of dollars was due (or has since become due, or state when it will be due) from , the owner, to , his contractor, and that the sum of dollars is now due (or state when it will be due) from , the contractor, to , the claimant, for the work (or materials furnished), pursuant to such contract with the said owner as aforesaid, and pursuant to said contract with , the contractor as aforesaid, no part of which last mentioned sum has been paid.

*Referee's Report as to Conclusions of Law.***No. 33.**

I find, as matter of law :

First.—That the claimant is entitled to a judgment against said , the owner, for the sum of dollars, being the amount due , his contractor, and the interest thereon from , amounting in all to the sum of dollars, and that said , the claimant, is entitled to a judgment against , his contractor, for the sum of dollars, and interest thereon from , amounting in all to the sum of dollars, and that , the claimant, have judgment against , for his costs in this proceeding.

*Clause, Adjusting Lien.***No. 34.**

Second.—That by filing the notice of lien hereinbefore described, the said acquired a valid lien upon all the right, title and interest which said had, on the day of , 1873, in and to the premises hereinbefore

described, and that said lien is still valid and subsisting upon said premises, to the said extent, for the amount of the judgment herein against the owner, and that said interest of the owner, be sold, according to law, to satisfy this judgment.

Clause—Where Lien has Expired.

No. 35.

Where the lien has expired by limitation while the proceedings are pending, it should continue as follows, as a conclusion of law :

Second.—That by filing the notice of lien hereinbefore described, the said acquired a valid lien upon all the right, title and interest which said had on the day of , 1873, at 11 o'clock, 50 minutes, A. M., in and to the premises hereinbefore described, but that said lien expired at the expiration of one year from the filing thereof, and is not now a lien upon said premises.

Clause—Where Claims are Marshaled.

No. 36.

Where there are successive liens by the contractor, subcontractor, workman, person or persons furnishing materials, and of a number of liens in favor of different persons, the conclusions of law should marshal them according to § 3 (*Ante*, 671), and be as follows, as conclusions of law :

Third.—That the said claims should be paid out of the proceeds of the sale of said property as aforesaid, in the following order :

First.—Amount of the said judgment and costs in favor of John D, &c.

Second.—Amount of the said judgment and costs in favor of, &c.

(Date of report.)

*Judgment.***No. 37.**

At a special term, &c.,*

(Title of the cause.)

The proceedings herein having been taken by _____
 for an accounting and fore-
 closure of the various notices of liens filed under the act en-
 titled "An act, &c., passed May 5th," 1863, relating to me-
 chanics' liens, and issue having been joined between the
 respective parties thereto, and the same having, by order dated

 been referred to Thomas H. Landon, as sole
 referee, to hear, try and determine the issues and rights of the
 respective parties herein, and he having duly made his report,
 containing his findings of fact and conclusions of law, said
 report bearing date _____, and the same having
 been filed (or being herewith presented to the court), by which
 it appears that _____ is entitled to judgment
 against _____, the contractor, for the sum of
 _____ dollars, and his costs herein, and that on the _____ day of
 _____, 1873, at 11 o'clock, 50 minutes, A. M.,
 the said _____ duly acquired
 a valid lien upon all the right, title and interest which the
 said _____, the owner, had in and
 to the premises hereinafter described, and that said lien is still
 valid and subsisting upon said premises to the said extent for
 the amount of the judgment against _____,
 the owner, and that said interest of _____,
 the owner, be sold according to law to satisfy the judgment
 against _____, the owner and
 contractor.

The following is a description of said premises.

Now on motion of _____ attorneys for

It is ordered and adjudged, &c.,

* The usual form of the *caption* as to the term and date of the judgment should be according to the fact. (See *Bowman vs. Tallman*, 28 *How.*, 482; *Wilson vs. Henderson*, 15 *How.*, 90; *Crawford vs. Wilson*, 4 *Barb.*, 504; *Rochester Bank vs. Emerson*, 10 *Paige*, 115, do. 359; *Hancock vs. Hancock*, 22 *N. Y.*, 568.)

Clause—When Money Deposited and Judgment against Owner or Contractor.

No. 41.

And that the sum so paid over be credited upon the amount of the said judgment herein in favor of said and that for the balance remaining due said from , as aforesaid, the said have execution for the deficiency unpaid upon said judgment.

Clause—In favor of Owner.

No. 42.

It is adjudged that the premises herein described (or money deposited thereon), be, and hereby is exempt from the claim and the notice of lien filed in the office of the clerk of the city and county of New York, on the day of 1873, by , against debtor, for the sum of , against the property (describe as in notice of lien), and the clerk of the city and county of New York is hereby directed to make the proper entry on the docket of said lien in accordance herewith.

*Directions to Sheriff, to be endorsed on certified copy of Decree, containing directions of sale, &c.**

No. 43.

To the Sheriff of the City and County of New York :

You are hereby required to enforce the within judgment against the property as within specified and directed, and to make a return thereon, with a report of your proceedings

* See form of such a decree, *ante*, 735 note.

thereon, to the clerk of the (Court of Common Pleas for the city and county of New York) with all convenient speed.

Dated New York, September, 1873.

Yours, &c.,

T—S,

Atty. for

*Execution against the Specific Property covered by one or more
Liens.*

No. 44.

The People of the State of New York to the Sheriff of the City
and County of New York, greeting :

Whereas, judgment was rendered on the _____ day of _____, 1873, in an action in the Court of Common Pleas for the city and county of New York in certain proceedings between _____ owner, and _____, contractor, and various claimants to enforce liens filed under the statute against _____, debtor, and against the building (describe as in notice of lien), in the city and county of New York, and the lot of land and the appurtenances to the same, which said lot and premises are bounded and described as follows:

(Describe property by metes and bounds.)

And whereas, said _____ was adjudged to be the owner of said building and premises at the time of perfecting the lien of _____, on the _____ day of _____, 1873, at 11 o'clock and 50 minutes A. M., and the sum of _____ dollars, was adjudged to be due said _____, claimant, from _____, his contractor, for work as carpenter and joiner in erecting the building aforesaid, and the sum of _____ was adjudged to be due from _____ the owner, to _____, the said contractor, in erecting the said building, all of which will more fully appear by the judgment roll herein, which was filed in the office of the clerk of the said Court of Common Pleas on the _____ day of _____, 1873.

And whereas, the said judgment was docketed in the office of the clerk of the city and county of New York, on the day of _____, 1873, and the sum of _____ dollars with interest thereon from _____, is now actually due upon said judgment. (The lien of each person as adjudged in the decree must be set forth in the preceding manner.)

Therefore we command you that you sell all the right, title and interest which the said _____, owner as aforesaid, had in and to the building and premises above mentioned at the time of the filing of the notice of lien of _____, to wit, on the _____ day of _____, 1873, at 11 o'clock and 50 minutes A. M. And that you sell the right, title and interest, &c. (the same as the judgment as to each lien.)

And that out of the proceeds of said sale that you satisfy the amount of the judgment of _____.

(Set forth the distribution of the proceeds as directed in the judgment.)

That if any amount of said judgment remain unpaid, that you satisfy the said judgment out of the personal property of said judgment debtor, within your county, or if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution, within sixty days after its receipt by you, to the clerk of the said Court of Common Pleas.

Witness, Hon. C. P. Daly, Chief Justice of said
Court of Common Pleas, at the Court House in
New York city, the _____ day of _____, 1873.

Atty. for

TABLE OF LIEN CASES CITED IN THIS VOLUME.*

A llen <i>vs.</i> Carman,	1 E. D. S., 692.
Althause <i>vs.</i> Warren.	2 E. D. S., 657.
Anderson <i>vs.</i> Dillaye,	47 N. Y., 678.
 B ailey <i>vs.</i> Johnson,	1 Daly, 61.
Barton <i>vs.</i> Hermann,	3 Daly, 320.
	s. c., 8 Abb., N. S., 399.
	11 Abb., N. S., 378.
Bandon, &c., <i>vs.</i> Co. Judge Rens.,	13 How., 398.
Beals <i>vs.</i> Cong. B. J.,	1 E. D. S., 654.
Belmont <i>vs.</i> Smith,	1 Duer, 675.
	s. c., 11 Leg. Ob., 216.
Berry <i>vs.</i> Weisse,	2 E. D. S., 662.
Blauvelt <i>vs.</i> Woodworth,	31 N. Y., 285.
Brien <i>vs.</i> Clay,	1 E. D. S., 649.
Brinkerhoff <i>vs.</i> Bd. of Education,	6 Abb., N. S., 418.
	s. c., 37 How., 499.
	2 Daly, 443.
Broderick <i>vs.</i> Poillon,	2 E. D. S., 554.
do. <i>vs.</i> Boyle,	1 Abb., 319.
Butler <i>vs.</i> Magie,	2 E. D. S., 654.

* This table of cases includes all up to and in the following reports: 50 *N. Y.* ; 45 *Howard* ; 6 *Lansing* ; 7 *Robertson* ; 2 *Sweeny* ; 1 *Jones & Spencer* ; 63 *Barber* ; 2 *Abb. Ct. of Appeals cases* ; and nearly every one included in 4 *Daly* and 14 *Abb., N. S.*

- C**arman *vs.* McIncrow, 2 E. D. S., 684.
 s. c., 13 N. Y., 70.
- Connon *vs.* Van Wagner, 2 E. D. S., 590.
- Carpenter *vs.* Jacques, 2 E. D. S., 571.
- Carroll *vs.* Coughlin, 3 Daly, 179.
 s. c., 7 Abb., N. S., 72.
- Chamberlain *vs.* O'Connor, 1 E. D. S., 665.
 s. c., 8 How., 45.
Ante, p. 33.
- Chapin *vs.* Stewart, 21 Wend., 397.
- Collins *vs.* Ellis, 3 E. D. S., 662.
- Conklin *vs.* Wood, 39 How., 41.
 s. c. 57 Barb., 299.
- Copley *vs.* O'Neill, s. c. 1 Lansing, 214.
 4 E. D. S., 721.
- Cox *vs.* Broderick, 4 E. D. S., 756.
- Cremin *vs.* Byrnes, 1 E. D. S., 647.
- Cronks *vs.* Whittacker, 1 E. D. S., 661.
- Cronkright *vs.* Thomson, 2 E. D. S., 583.
- Crystal *vs.* Flannelly, 3 E. D. S., 650.
- Cunningham *vs.* Jones, s. c., 4 Abb., 433.
 1 E. D. S., 716
- Cusack *vs.* Tomlinson,
- D**evlin *vs.* Mack, 2 Daly, 94.
- Dennistoun *vs.* McAllister, 4 E. D. S., 729.
- Dixon *vs.* LaFarge, 1 E. D. S., 722.
- Donaldson *vs.* Wood, 22 Wend., 395.
- Donaldson *vs.* O'Connor, 1 E. D. S., 595.
- Donnelly *vs.* Libby, 1 Sweeny, 259.
- Doughty *vs.* Devlin, 1 E. D. S., 625.
- Dressel *vs.* French, 7 How., 350.
- Duffy *vs.* McManus, 3 E. D. S., 657.
- do Brady, s. c., 4 Abb., 432.
- Dunning *vs.* Clark, 2 E. D. S., 535.
- E**agleson *vs.* Clark, 2 E. D. S., 644.
 s. c., 2 Abb., 364.
- Empire Dressing Co. *vs.* Pick-
 ering, Nott's Lien Law, p. 44.
- Ernst *vs.* Reed, 49 Barb., 368.

F erguson <i>vs.</i> Burke,	4 E. D. S., 760.
Fettrech <i>vs.</i> Totten,	2 Abb., N. S., 264.
Foley <i>vs.</i> Alger,	4 E. D. S., 719.
Foley <i>vs.</i> Gough,	4 E. D. S., 724.
Foster <i>vs.</i> Poillon,	2 E. D. S., 556.
	1 Abb., 321.
Foster <i>vs.</i> Skidmore,	1 E. D. S., 719.
Freeman <i>vs.</i> Arment,	5 Leg. Ob., 381.
Freeman <i>vs.</i> Cram,	3 N. Y., 305.
G ay <i>vs.</i> Brown,	1 E. D. S., 725.
Gillen <i>vs.</i> Hubbard,	2 Hilt., 303.
Gourdier <i>vs.</i> Thorp,	1 E. D. S., 697.
Graff <i>vs.</i> Rosenberg,	6 Abb., N. S., 428, note.
Grant <i>vs.</i> Vandercook,	57 Barb., 165.
Gridley <i>vs.</i> Rowland,	1 E. D. S., 670.
Grogan <i>vs.</i> McMahon,	4 E. D. S., 754.
“ <i>vs.</i> Raphael,	s. c., 6 Abb., 306.
Grogan <i>vs.</i> The Mayor,	2 E. D. S., 693.
H all <i>vs.</i> Lamb,	3 Lansing 134.
Hallahan <i>vs.</i> Herbert,	2 Daly, 253.
	11 Abb., N. S., 326.
	4 Daly, 209.
Haswell <i>vs.</i> Goodchild,	12 Wend., 373.
Hatch <i>vs.</i> Coleman,	29 Barb., 201.
Hauptman <i>vs.</i> Catlin,	1 E. D. S., 729.
	4 Abb., 472.
	s. c., 3 E. D. S., 666.
	affd., 20 N. Y., 247.
Hauptman <i>vs.</i> Halsey,	1 E. D. S., 668.
Hazard Powder Co., <i>vs.</i> Byrnes,	12 Abb., 469.
	s. c. 21 How., 189.
Henderson <i>vs.</i> Sturgis,	1 Daly, 336.
Heroy <i>vs.</i> Hendricks,	4 E. D. S., 768.
Hoyt <i>vs.</i> Miner,	7 Hill, 525.
Hubbell <i>vs.</i> Schreyer,	14 Abb., N. S., 284.
	4 Daly, 362.
Huxford <i>vs.</i> Bogardus,	40 How., 94.

- J**ackson *vs.* Sloan, 2 E. D. S., 616.
 2 Abb., 104.
- Jaques *vs.* Morris, 2 E. D. S., 639.
- K**aylor *vs.* O'Connor, 1 E. D. S., 672.
 Kennedy *vs.* Paine, 1 E. D. S., 651.
 Kirby *vs.* Daly, 45 N. Y., 84.
 Knapp *vs.* Brown, 45 N. Y., 207.
 s. c. 11 Abb., N. S., 118.
Ante, p. 31.
- L**ehretter *vs.* Koffman, 1 E. D. S., 664.
 s. c., 1 Code, Rep., N. S., 284.
- Lennox *vs.* Yorkville Bap: Ch., 2 E. D. S., 673.
- Linn *vs.* O'Hara, 2 E. D. S., 560.
- Livingston *vs.* Mildrum, 19 N. Y., 440.
- Livingston *vs.* Miller, 16 Abb., 371.
- Loonie *vs.* Hogan, 2 E. D. S., 681.
 s. c., 9 N. Y., 435.
 12 Leg. Ob., 225.
- Lowber *vs.* Childs, 2 E. D. S., 577.
 s. c., 1 Abb., 415.
- Lutz *vs.* Ey, 3 E. D. S., 621.
 3 Abb., 473.
- Lynch *vs.* Cashman, 3 E. D. S., 660.
- M**altby *vs.* Green, 1 Keyes, 548.
 3 Abb., Ct. App., 144.
- Mandeville *vs.* Reed, 13 Abb., 173.
- Mathews *vs.* Daly, 38 How., 382.
 7 Abb., N. S., 379.
 3 Daly, 214.
- Maxey *vs.* Larkin, 2 E. D. S., 540.
- Meehan *vs.* Williams, 36 How., 73.
 s. c. 2 Daly, 367.
- Meyers *vs.* Seebald, 11 Abb., N. S., 326.
- Miller *vs.* Clark, 2 E. D. S., 543.

- Miller *vs.* Moore, 1 E. D. S., 739 & 747.
 Miner *vs.* Hoyt, 12 Leg. Ob., 53.
 4 Hill, 193.
 Affid. 7 Hill., 525.
 Monteith *vs.* Evans, 3 Sandf., 65.
 Moore *vs.* Mausert, 5 Lans., 173.
 Muldoon, *vs.* Pitt, 4 Daly, 105.
 Mushlitt *vs.* Silverman, 50 N. Y., 360.
 McAuley *vs.* Mildrum, 1 Daly, 396.
 McBride *vs.* Crawford, 1 E. D. S., 658.
 McDermott *vs.* Palmer, 2 E. D. S., 675.
 s. c., 8 N. Y., 383.
 revg., 11 Barb., 9.
 McGuckin *vs.* Coulter, 1 Jones & S., 324.
 10 Abb., N. S. 128.
 McGuckin *vs.* Coulter, 1 Jones & S. 328.
 McMahon *vs.* Tenth Ward, &c., 12 Abb., 129.
 McMullen *vs.* Chester, 1 Daly, 401, note.
 McSorley *vs.* Hogan, 1 Code, R. N. S., 285.
 Nolan *vs.* Gardner, 4 E. D. S., 727.
 Noyes *vs.* Burton, 29 Barb, 631.
 s. c., 17 How., 449.
 O'Donnell *vs.* Rosenberg, 14 Abb., N. S., 59.
 Oates *vs.* Haley, 1 Daly, 338.
 Ogden *vs.* Bodle, 2 Duer, 611.
 Ombony *vs.* Jones, 21 Barb., 520.
 affid., 19 N. Y., 233.
 Otis *vs.* Cusack, 43 Barb., 546.
 Owens *vs.* Ackerson, 1 E. D. S., 691.
 s. c., 8 How., 199.
 Paine *vs.* Bonney, 4 E. D. S., 734.
 less full, 6 Abb., 99.
 Pendleburg *vs.* Meade, 1 E. D. S., 728.
 People ex rel Bendon, *vs.* Co. Judge R., Co. 13 How., 393.
 Pike *vs.* Irwin, 1 Sandf., 14.

Poillon <i>vs.</i> The Mayor, &c.,	47 N. Y., 666.
Pollock <i>vs.</i> Ehle,	2 E. D. S., 541.
Porschke <i>vs.</i> Kedenberg,	6 Abb., N. S., 172.
Protective Union <i>vs.</i> Nixon,	1 E. D. S., 571.

Q uimby <i>vs.</i> Sloan,	2 E. D. S., 594.
----------------------------------	------------------

s. c., 2 Abb., 93.

Quinn <i>vs.</i> The Mayor, &c.,	2 E. D. S., 558.
“ <i>vs.</i> Oliff,	1 Abb., 322.

R andolph <i>vs.</i> Foster,	3 E. D. S., 648.
-------------------------------------	------------------

s. c., 4 Abb., 262.

Randolph <i>vs.</i> Garvey,	10 Abb., 179.
-----------------------------	---------------

19 How., 505.

Randolph <i>vs.</i> Leary,	3 E. D. S., 637.
----------------------------	------------------

4 Abb., 205.

Rafter <i>vs.</i> Sullivan,	13 Abb., 262.
-----------------------------	---------------

Reynolds <i>vs.</i> Hamil,	1 Code, R. N. S., 230.
----------------------------	------------------------

Roberts <i>vs.</i> Fowler,	3 E. D. S., 632.
----------------------------	------------------

s. c., 4 Abb., 263.

Rollin <i>vs.</i> Cross,	45 N. Y., 766.
--------------------------	----------------

Rudd <i>vs.</i> Davis,	1 Hill., 277.
------------------------	---------------

3 Hill, 287.

affd., 7 Hill 529.

S chafer <i>vs.</i> Reilly,	50 N. Y., 61.
------------------------------------	---------------

Schaettler <i>vs.</i> Gardiner,	41 How., 243.
---------------------------------	---------------

4 Daly, 56.

on app., 47 N. Y., 404.

Schneider <i>vs.</i> Holbein,	41 How., 232.
-------------------------------	---------------

Sinclair <i>vs.</i> Fitch,	3 E. D. S., 677.
----------------------------	------------------

Spaulding <i>vs.</i> King,	1 E. D. S., 717.
----------------------------	------------------

s. c., 12 Leg. Ob., 186.

Spencer <i>vs.</i> Barnett,	35 N. Y., 94.
-----------------------------	---------------

Spratt <i>vs.</i> Nicholson.	3 Daly, 186.
------------------------------	--------------

Stone <i>vs.</i> Smith,	3 Daly, 213.
-------------------------	--------------

Stuyvesant <i>vs.</i> Browning,	1 Jones & S., 203.
---------------------------------	--------------------

Sullivan <i>vs.</i> Brewster,	1 E. D. S., 681.
-------------------------------	------------------

s. c., 8 How., 207.

Sullivan <i>vs.</i> Decker,	1 E. D. S., 681.
	12 Leg. Ob., 109.
Suydam <i>vs.</i> Holden,	11 Abb., N. S., 329.
Smith <i>vs.</i> Coe,	2 Hilt., 364.
	affd., 29 N. Y., 666.
Smith <i>vs.</i> Corey,	3 E. D. S., 642.
	less full, 4 Abb., 208.
Smith <i>vs.</i> Ferris,	1 Daly, 18.
Smith <i>vs.</i> Manice,	1 Code, R. N. S., 283.

T eaz <i>vs.</i> Chrystie,	2 E. D. S., 635.
	s. c., 2 Abb., 259.
	2 Abb., 109.
	s. c., 2 E. D. S., 621.
Telfer <i>vs.</i> Kierstead,	9 Abb., 418.
	2 Hilt., 577.
Thompson <i>vs.</i> Yates,	28 How., 142.
Tinker <i>vs.</i> Geraghty,	1 E. D. S., 687.
Trim <i>vs.</i> Willoughby,	44 How., 189.

V an Cleve <i>vs.</i> Abbatt,	3 Abb., N. S., 144.
--------------------------------------	---------------------

W alker <i>vs.</i> Paine,	2 E. D. S., 662.
Webb <i>vs.</i> Van Zandt,	16 Abb., 190.
	dif., do 314.
Welch <i>vs.</i> The Mayor,	19 Abb., 132.
Westervelt <i>vs.</i> Levy,	2 Duer, 354.
Williamson <i>vs.</i> Hendricks,	10 Abb., 98.
Wood <i>vs.</i> Donaldson,	17 Wend., 550.
	affd. 22 Wend., 395.

Y oung Stone D. Co. <i>vs.</i> Wardens, &c.,	61 Barb., 489.
---	----------------

INDEX.

	No.
ACTION :	
pendency of, ordinary effect of.....	657-659
when a bar.....	658
election of.....	661
AFFIDAVIT:	
(See Forms.)	
AMENDMENT:	
allowed as to form.....	406, 520, 796
not allowed to notice of lien.....	652
“ “ “ verification of notice.....	652
when allowed as under the Code.....	652, 653
when referee cannot allow.....	521, 522
ANSWER:	
form of, discussed.....	408, 440, 446
may contain counter-claim.....	447-468
(See Set-off.)	
APPEALS :	
time for.....	896
forms of.....	880
when allowed to Court of Appeals.....	884
hearing of.....	895
from orders, when allowed.....	888-894
ARREST AND BAIL:	
not allowed in lien proceedings.....	660
(See Provisional Remedies.)	
ASSIGNMENT:	
fraudulent, of owner or contractor.....	274
of lien cannot be before filing.....	7, 9
may be after filing.....	8
of contractor, effect of.....	13-18, 131-137, 274, 610
of owner.....	109-112
(See Bankruptcy.)	

	No.
ATTACHMENT :	
against property not allowed herein.....	660
the person not allowed.....	863
(See Provisional Remedies.)	
BANKRUPTCY :	
of owner, effect of.....	109-112
of contractor ".....	13-18, 131-137
effect of, before notice filed.....	137
" after ".....	137, 261-263
" before proceedings.....	263
" after ".....	261, 262
* (See Assignment.)	
BILL OF PARTICULARS :	
when to be given.....	474-477
what to contain.....	471
form of, discussed.....	471, 473
may be amended.....	652
evidence under.....	471, 483
proof of.....	587
(See Variance and Forms.)	
CASES :	
table of lien reported.....	p. 211
CLAIM :	
form of, in lien cases.....	438-442
for surplus in foreclosure of mortgage.....	541, 546
CLAIM AND DELIVERY OF PROPERTY :	
not allowed herein.....	660
(See Provisional Remedies.)	
CONTRACT :	
may be expressed or implied.....	581, 3
effect of as evidence.....	577-586
effect when no.....	615, 618
governs all persons under it.....	577
constructive notice of to all under it.....	578
extent of liability under it.....	579, 617
effect of fraudulent.....	618
substantial performance of, sufficient.....	599
when broken by contractor.....	602-613
effect of assignment (see Assignment).....	
measure of damages (see Damages).....	
COMPLAINT :	
(See Pleadings.)	
CONTRACTOR :	
who is.....	678
may commence proceedings.....	238, 264

	No.
CONTRACTOR :	
relations to sub-contractor.....	678
relations to owner.....	678
personally liability of.....	676
extent of liability of.....	676, 679, 680
liability of owner to.....	670
effect of abandoning the work.....	556, 602-608, 619
" " assignment of.....	13-18, 131-137
" " death of.....	
(See Bankruptcy and Assignment.)	
CONTINUANCE OF LIEN :	
(See Lien and Forms.)	
COSTS :	
when allowed.....	790
amount of.....	788
on appeal.....	825, 826
on motions.....	797
allowances as.....	785, 804, 805
when referee must determine.....	709
COUNTER-CLAIM :	
(See Set-off.)	
COUNTY CLERK :	
must docket lien.....	186, 187
enter notices of action.....	185
make searches for liens.....	186
discharge liens.....	200
presumed to do his duty.....	567
certificates of as evidence.....	565-567
(See Forms.)	
DAMAGES :	
when allowed against sub-contractor.....	448, 454-469
measure of " ".....	454-458, 601-608
(See Set-off.)	
DEMURRER :	
to complaint.....	407, 408, 430, 428
to answer.....	408
to set-off.....	408, 469
to reply.....	408, 469
to claim.....	408, 440, 446
(See Pleadings.)	
DEATH :	
of owner, effect of.....	124
of contractor, effect of.....	19
no lien by representatives.....	124, 127

DEFENSES:

(See Pleadings and Set-off.)

DISCHARGE OF LIEN:

(See Lien and Forms.)

DISTRICT COURT:

jurisdiction of.....	224-229
form of notice commencing in.....	229, 244
parties in.....	402
removal from, not allowed.....	230
pleadings in.....	443
costs in.....	788, 825
form of judgment in.....	753
" transcript.....	757
" execution.....	856, 858
Appeals from.....	875

EXCEPTIONS:

(See Referee.)

EXECUTION:

form not specified.....	828, 844
must follow the judgment.....	832, 846
for deficiency.....	840-844
on judgment of Marine and District Courts.....	858
supplemental proceeding after.....	866
after sale on, no redemption.....	869, 870
(See Forms.)	

EVIDENCE:

rules of, in these cases.....	550-629
parties may give testimony.....	551
burden of proof.....	446, 552-568
effect of contract as (see contract).....	
County Clerk's certificate as.....	565-567

FORECLOSURE OF LIENS:

how commenced.....	235-263
parties to.....	264-404
pleadings and claims in.....	405-510
modes of trial.....	511-549
evidence.....	550-661
judgment.....	662-784
costs in.....	785-827
execution.....	828-899
(See Forms.)	
of mortgage (see mortgage).	

FORMS.....page 181.

(For a *discussion* of the subjects mentioned under this head, see each under its particular title.)

	No.
Notice of Lien.....	1
verification to.....	2, 3
to foreclose lien by claimant.....	4
by owner.....	6
order for issnes.....	5
complaint by sub-contractor.....	7
when deposit made.....	8
affidavit for continuance of lien.....	8
order continuing lien.....	10
affidavit to discharge lien.....	11
when deposit made.....	12
order discharging lien.....	13
when money deposited.....	14
affidavit and petition to be made party defendant.....	15
order making party defendant.....	16
affidavit to obtain summons under § 5.....	17
summons under § 5.....	18
notice under §§ 4 and 5.....	19
order bringing in necessary party.....	20
bill of particulars.....	21
County Clerk's certificate of lien filed.....	22
when money deposited.....	23
when lien continued.....	24
when lien has expired.....	25
Referee's Report:	
on facts.....	26
when money deposited.....	27
when lien continued.....	28
when lien expired.....	29
in favor of owner against contractor.....	30
in favor of sub-contractor and owner.....	31
against owner and contractor.....	32
conclusions of law.....	33
adjudging lien.....	34
when lien expired.....	35
marshaling claims.....	36
Judgment:	
general form recitals.....	37
personal judgment.....	38
lien against property.....	39
against money deposited.....	40
money deposited, and personal.....	41
in favor of owner.....	42
Execution:	
endorsement of, in decree of sale.....	43
against specific property.....	44

INJUNCTION :

may be allowed	665
(See Provisional Remedies.)	

JUDGMENT :

what to contain	662-674
personal	675-700
when lien expired	693-699
form of	730-741
entry of	742-770
effect of	771-781
transcript of	757
of reversal	782-783
of affirmance against owner	827
(See Forms and Referee.)	

JURISDICTION OF COURTS :

Supreme Court	222
Superior Court	222
Common Pleas	222
Marine Court	224-229
District Courts	224-229
Court of Appeals	884
City Court of Brooklyn	938-942
county courts	938-942
on appeal	875-899

KINGS AND QUEENS COUNTIES :

statutes relating to	p. 161
compared with New York city, laws of 1851-55	900
who may acquire lien under	901, 902
time of perfecting	903-904
form of notice under	905
owner who is	906
notice must be served on owner	907
extent of lien	919
continuance of	920
discharge of	922-937
time and manner of enforcing	938, 939
jurisdiction of courts in	940-943
parties to action in	943-946
contractor cannot require commencement of action	934, 935
pleadings under	417, 939
trial	939, 951
personal judgment	952, 953
costs	954
form of judgment	955
execution	956
surplus after sale	957
effect of payment by owner	958
appeals under	959
effect of	960-963

LAWS:

(See Statutes.)

LESSEE:

when deemed owner 62-73, 628, 629

LESSOR:

when deemed owner 62-73, 628, 629

LIEN:

who may acquire. 1-20
 for what it may be acquired 21-37
 time of filing notice 38-57
 on what and extent 58-139
 form of notice 140-186
 priority of. 665-673
 continuance of. 187-198
 discharge of. 199-221
 how to avoid. 627, 628
 judgment establishing lien (see Judgment.)
 (See Marshaling and Forms.)

LIS PENDENS:

none under this statute. 764, 765, 928

MARINE COURT:

jurisdiction of. 224-229
 form of notice commencing in. 229, 244
 parties in 402
 costs in 788, 825
 form of judgment in. 753
 " transcript. 757
 " execution 856, 858
 appeals in. 875
 " form 875, 897, 898

MARSHALING:

how obtained. 510, 533
 of liens. 121, 665-672
 securities and assets 510, 665-672
 judgments 119
 mortgages 91-94
 when does not apply. 864
 (See Preferences.)

MORTGAGE, FORECLOSURE OF:

proceedings in 489, 521-546
 " when surplus after sale 442, 521-546

NOTICE :

of lien, form of.....	140-186
claim under.....	438-443
to commencing proceedings on lien.....	229-244
from owner to lienor, requiring commencement.....	229-244
of trial in action on.....	514, 542
motion in.....	514
appeal.....	680
argument of appeal.....	514
(See Forms.)	

ORDER :

for issues to be joined.....	409-413
appealable, what is.....	888-894
(See Forms.)	

OWNER :

who is regarded as.....	58-127, 628
extent of liability of property.....	58-139
personal liability.....	676
may commence proceedings.....	264, 236
effect of bona fide transfer.....	89-92
fraudulent transfer.....	93-95, 274
assignment of.....	109-112
death of.....	124
(See Bankruptcy and Assignment.)	

PARTIES :

who may be.....	264-404
necessary.....	278
proper.....	287
may give testimony.....	551
how brought in.....	293-402
(See Forms.)	

PARTICULARS :

bill of (see Bill of Particulars).

PLEADINGS :

form of.....	405-510
Complaint.....	408-435
Answer.....	408, 446-457
Reply.....	408, 469
Demurrer.....	408, 469
(See Set-off.)	
Amendment of.....	
(See Amendment.)	
verification of.....	438

PREFERENCES:

No.

lien over a judgment	119
mortgage	91-99
deed	91-93, 99
contract to sell	105
other liens	91-112, 121, 665-667
general judgments	864
(See Marshaling.)	

PROCEEDINGS:

to continue lien	187-198
to discharge lien	199-221
to foreclose lien	235-263
mortgage	489, 521-546
to obtain surplus after sale	521-546
(See Forms.)	

PROVISIONAL REMEDIES:

none allowed before judgment	660
injunction may be allowed	656
allowed after judgment	866

RECEIVER:

not allowed before judgment	554, 660
formerly allowed	655
may be after judgment	866

REFEREE:

trial by	515-518
may report on one or more questions of fact	515
when cannot allow amendment	521, 522
Marine and District Courts cannot refer	524-228
report of, what to contain .. 664-673, 675, 697, 701, 702, 707-709, 712, 724	
how regarded	710
exceptions to	711-722
judgment on	727, 731-741

(See Forms, Trial, and Judgment.)

SECURITY:

(See Appeal.)

STAY OF PROCEEDINGS:

(See Appeal.)

SET-OFF:

may be allowed	446-450
what may be allowed as	454-469
between whom	459-468
extent of	448, 449, 700

STATUTES:

relating to New York city, 1851	p. 11-15
" " " 1855	15-17
" " " 1863	4-10

No.

STATUTES:

Relating to New York city, 1866.....	p. 5
" " " 1870.....	10
" " " 1872.....	11
relating to Kings and Queens counties, 1862.....	163-169
" " " 1845.....	177

SUB-CONTRACTOR:

who is.....	678
may commence proceedings.....	264
relations to contractor.....	678
" to owner.....	678
personal liability of.....	676
extent of liability of.....	676, 679, 680
liability of owner to.....	676
effect on if work abandoned.....	556, 573, 602-608, 619
effect on if contractor assigns.....	13-18, 131-137
effect of death of.....	19

TIME:

to file notice of lien for work.....	21-37
to file notice of lien for materials.....	21-37
of service of notice of foreclosure.....	229, 235, 237
of service of pleadings.....	405-409
of service of claims.....	410, 411
to appeal.....	896

TRIAL, MODES OF:

before referee.....	515-518
by jury.....	519, 939
by the court.....	524
in other proceedings.....	258-263
(See Evidence.)	

VARIANCE:

what is a material.....	630-653
when amendment allowed.....	652, 796
when to object to.....	653

VENDEE:

when deemed owner.....	80-108, 906
------------------------	-------------

VENDOR:

when deemed owner.....	80-108, 906
------------------------	-------------

VERIFICATION:

of notice of lien.....	167-177
form of, discussed.....	170
to plesdings.....	438, 439, 479
to claims.....	439
to bill of particulars.....	479
(See Forms.)	

